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IN THE

Supreme Court of the United States

OCTOBER TERM, 1915

EX PARTE: THE UNITED STATES, *Petitioner*

BRIEF FOR THE RESPONDENT


Many Robbed of Its Sting
THE TOLEDO LEGAL BRIEF & RECORD CO.

INDEX

PAGE.

STATEMENT 1-4

Prooceeding against Henahan..... 1-2
Scope of the question..... 2
Division of the subject 2
Extent of exercise at common law..... 2
Extent of exercise at present time..... 2
Extent of exercise by Federal courts..... 2
Propositions contended for by respondent..... 3
1. Power existed and exercised at common law; if not, its propriety now recognized..... 3
2. One of the implied powers of Federal courts, 3
3. Federal judicial and penal statutes construed in practice to admit exercise of the power 3
4. Not an invasion of the pardoning power.... 3
5. To complete exercise of the power courts may retain jurisdiction after the term..... 3
6. Right of a defendant to a suspension of sentence 3
7. Circumstances authorizing a suspension..... 3

ARGUMENT.

1. **Power existed and exercised at common law; if not, its propriety now recognized**..... 4-57
Consideration of decisions and text writers... 4-48
Common law authorities..... 4-15
English decisions 15-20
Conflict in interpretation of early authorities 20-23
Continuous exercise of power.....23-24
Reasons for absence of definite precedent..24-25
State decisions 25-37
Analysis of State decisions.....37-44
Method of suspension not affect power..... 44
Decisions sustaining respondent's views.... 44
Federal decisions 45-48
Reasons for existence and exercise of the power 48-51
Theory of the vindication of the law rejected 49

PAGE.

Effect of changed social conditions..... 50
Demand of the individual case.....50-51
The power not a delegation of prerogative, but inherent 51-52
Results if power denied.....52-53
Inelasticity of punishment..... 52
Impossibility of meeting extraordinary situations 52
Inadequacy of statutory remedy.....52-53
The criminal law constantly developing.....53-57
Force of custom and practice in development of law 54-56
Recognition of the power by Department of Justice 56-57

2. **The power one of the implied powers of Federal courts** 57-60
Power inherent in the word "court".....57-59
Federal courts governed by common law in administration of the criminal law.....59-60

3. **Federal judicial and penal statutes construed in practice to admit exercise of the power,** 60-65
Continuous and unquestioned use of the power 60-61
Decisions sustaining practical construction of judicial powers 61-64
The power recognized by Congress.....64-65

4. **Exercise of the power not an invasion of the pardoning power** 65-71
A concurrent limitation on pardoning power.... 65
Pardon and reprieve distinguished.....66-67
Constitutionality of statutes authorizing suspended sentences 67-71
Conflict of State decisions..... 67
Continuous recognition of exercise by government 68-71
Amnesty statutes 68
Case of accomplices..... 69
Remission of penalties by department 69-71

5. **To complete exercise of the power courts may retain jurisdiction after the term**..... 71

PAGE

6. **Defendant may have a RIGHT to a suspension** 71-74
To apply for a pardon 71-74

7. **Circumstances authorizing a suspension** 74-80
Indefinite suspension to prevent injustice 75
Comparative rights of defendant and government 75-78
Necessity of defendant's consent . . . 76-78
Duration of suspended sentence 78-79
No fixed rule governing exercise of power 79-80

CONCLUSION 80-81

AUTHORITIES CITED.

Allen vs. State, Mart. & Yerg. 294 . . . . . 36, 40, 72
Allen vs. State, 77 Tenn. 651 36
Anonymous, 2 Dyer 165a 11
Anonymous, 2 Dyer 205a 10, 71
Anonymous, 2 Dyer 235a 10, 15
Atkins vs. Fiber Disintegrating Co., 18 Wall, 272 63

Bank of United States vs. Halstead, 10 Wheat. 51, 62 . . . 63
Barwick vs. State, 107 Ark. 115 25
Bechuanaland Exploration Co. vs. London Trading Bank, 2 Q. B. (1898) 658 55
Belden vs. Hugo, Conn. (1914); 91 Atl. 369 27
Bird vs. Cincinnati, 12 W. L. B. 101 35
Blazier vs. Keffer, 79 N. J. L. 252 33
Brabandt vs. Commonwealth, 157 Ky. 130 29
Brown vs. Walker, 161 U. S. 591 . . . . . 43, 67
Butler vs. State, 97 Ind. 373 . . . . . 29, 42

Carnal vs. People, 1 Parker's Crim. Rep. 262 33
Clifford vs. Heller, 63 N. J. L. 105 . . . . . 14, 33
Cohens vs. Virginia, 6 Wheat. 264, 420 62
Commonwealth vs. Dowdican's Bail, 115 Mass. 133 . . 30, 44
Commonwealth vs. Dunleavy, 16 Pa. Super. Ct. Rep. 380 . . . . . 35, 44
Commonwealth vs. Halloway, 42 Pa. St. 446 67
Commonwealth vs. Maloney, 145 Mass. 205 30
Commonwealth vs. Mayloy, 57 Pa. St. 291 35

PAGE.

Commonwealth vs. Nuber, 6 Pa. Super. Ct. Rep. 420... 35
Cox vs. State, Ark. (1914); 169 S. W. 789..... 25
Crane vs. State, 94 Tenn. 98.....36, 40, 73

Daniel vs. Persons, 137 Ga. 826..... 27

Erwin vs. United States, 37 Fed. 470, 488..... 60
Ex parte Bates, N. Mex. (1915); 151 Pac. 698....33, 67
Ex parte Bugg, Mo. App. (1912); 145 S. W. 831 .....32, 38, 39, 79
Ex parte Clendenning, 22 Okla. 108..... 35
Ex parte Cornwall, 223 Mo. 259..... 32
Ex parte Lange, 18 Wall. 163..... 41
Ex parte James Morton, 132 Cal. 346..... 26
Ex parte Parker, 106 Mo. 551.....32, 67
Ex parte Peake, 144 Fed. 1016..... 58
Ex parte Scott, 19 O. S. 581..... 57
Ex parte Sparks, Okla. Cr. App. (1913); 132 Pac. 1118 35
Ex parte Wells, 18 How. 307.....45, 46, 65, 71, 78
Ex parte Williams, 26 Fla. 310..... 27

Fairbank vs. United States, 181 U. S. 283, 307..... 63
Fuller vs. State, 100 Miss. 811; 57 So. 6, 806.....31, 38
Fults vs. State, 2 Sneed 232..... 36

Gehrmann vs. Osborne, 79 N. J. Eq. 430...21, 32, 44, 75, 76
Gibson vs. State, 68 Miss. 241..... 31
Gordon vs. Johnson, 126 Ga. 584..... 28
Gray vs. State, 109 Ind. 177..... 29
Greene vs. State, 88 Ark. 290..... 26
Grundel vs. People, 33 Colo. 191..... 26

Hancock vs. Rogers, 140 Ga. 688..... 28
Harris vs. Lang, 27 App. D. C. 84..... 27
Harris vs. Nixon, 27 App. D. C. 94.....27, 78
Hoggett vs. State, 101 Miss. 269; 57 So. 9, 811..... 31
Howard vs. United States, 75 Fed. 986, 990.....58, 60

In re James Allen, unreported, (U. S. Dist. Ct. Kans.). 47
In re Beck, 63 Kan. 57..... 29
In re Collins, 8 Cal. App. 367..... 26
In re Crow, 60 Wis. 370..... 39

PAGE.

In re Flint, 25 Utah 338 36
In re Giannini, 18 Cal. App. 166 ..... 26, 67
In re Martha A. Hart, 29 N. Dak. 38 ..... 34, 67
In re Henry, 123 U. S. 372 58
In re Leo Hinson, 156 N. C. 250 34
In re Clara Lee, 3 N. P. n. s. (Ohio) 533 35
In re Carl Leopold, unreported (Dist. Ct. N. Mex.) .. 33, 47
In re Lujan, 18 N. Mex. 310 33
In re Thomas Lynch, 12 Can. Crim. Cas. 141 14
In re Markuson, 5 N. Dak. 180 34
In re Peterson, 19 Idaho 433 28
In re Shaw, 31 Minn. 44 31
In re Strickler, 51 Kan. 700 29
In re Webb, 89 Wis. 354 ..... 37, 39

Joiner vs. State, 94 Ark. 198 25

Keen vs. Queen, 10 Q. B. (1847) 928 16
King vs. Inhabitants of County of Oxford, 13 East 411, note 19
King vs. Inhabitants of Wandsworth, 1 Barn. & Ald. 63. 19
Kirkman vs. McClaughry, 152 Fed. 255 58

The Laura, 114 U. S. 411 ..... 63, 69

McCampbell vs. State, 116 Tenn. 98 36
McKeen vs. Delancy's Lessee, 5 Cranch 22 ..... 61, 70
Mann vs. People, 16 Colo. App. 475 26
Marks vs. Wentworth, 199 Mass. 44 ..... 30, 77
Martin vs. Hunter's Lessee, 1 Wheat. 304, 352 62
Miller's Case, 9 Cowen 730 ..... 33, 68
Miller vs. Evans, 115 Ia. 101 29
Miller vs. United States, 41 App. D. C. 52 27

Neal vs. State, 104 Ga. 509 ..... 28, 42
New Jersey Navigation Co. vs. Merchants' Bank, 6 How. 344, 385 63
Nobles vs. State of Georgia, 168 U. S. 398 47

O'Dwyer vs. Kelly, 133 Ga. 824 28

Parker vs. State, 135 Ind. 534 29
People vs. Allen, 155 Ill. 61 ..... 28, 29, 40

PAGE

People vs. Barrett, 202 Ill. 287.....28, 29, 40
People vs. Blackburn, 6 Utah 347.....36, 51
People vs. Brown, 54 Mich. 15..... 30
People vs. Court of Sessions, 141 N. Y. 288, 23, 24, 33, 44, 66, 67, 80
People vs. Court of Sessions, 66 Hun. 550..... 33
People vs. Court of Sessions, 8 N. Y. Crim. Rep. 355.. 33
People vs. Cummings, 88 Mich. 249.....31, 41
People vs. Dudley, 173 Mich. 389.....31, 41
People vs. Felix, 45 Cal. 163..... 26
People vs. Felker, 61 Mich. 110 41
People vs. Flynn, 55 Misc. 639..... 34
People vs. Goodrich, 149 N. Y. Supp. 406.....34, 44, 70
People vs. Graves, 31 Hun. 382..... 34
People vs. Harrington, 15 Abb. N. C. 161..... 33
People vs. Heise, 257 Ill. 443, 450.....29, 40, 67
People vs. Kennedy, 58 Mich. 372..... 30
People vs. Morrisette, 20 How. Pr. 118..... 34
People vs. Mueller, 4 Crim. Law Mag. 725; 15 Chi. Leg. N. 364 .....28, 40, 74
People vs. Patrich, 118 Cal. 332..... 26
People vs. Reed, et al., 1 City Hall Rec. 4, 6, 21, 28, 41. 34
People vs. Reilly, 53 Mich. 260..... 30
People vs. Robertson, 6 Cal. App. 514..... 26
People vs. Robinson, 46 Cal. 94..... 26
People vs. Stickle, 156 Mich. 557.....30, 41, 66, 67
People vs. Webster, 14 Misc. 617 33
People vs. Whipple, 9 Cowen 707, 715..... 33
Phillips vs. State, Ark. (1911); 140 S. W. 734..... 26
Pointer vs. United States, 151 U. S. 396, 419..... 45

Queen vs. Richardson, 8 Dowl. P. C. 511.....16, 44

Reese vs. Olsen, 44 Utah 318..... 36
Regina vs. Ryan, 7 Cox Crim. Cas. 109.....16, 44
Republic of Hawaii vs. Pedro, 11 Hawaii 287..... 28
Rex vs. Inhabitants of Southampton, 2 Chitty 215..... 19
Roberts vs. Wansley, 137 Ga. 439..... 28

St. Hilaire, Petitioner, 101 Me. 522..... 30
Schaefer vs. State, 7 C. C. Rep. n. s. (Ohio) 292..... 35
Snodgrass vs. State, Tex. Crim. Rep. (1912); 150 S. W. 162 .....36, 40, 67

PAGE.

Spencer vs. State, 125 Tenn. 64.....36, 39, 67
State vs. Abbot, 87 S. C. 466.....35, 73
State vs. Addy, 43 N. J. L. 113.....13, 32, 67, 79
State vs. Baker, 3 N. P. n. s. (Ohio) 622..... 42
State vs. Bennett, 4 Dev. & Bat. 43..... 34
State vs. Brewer, N. J. L. (1904); 59 Atl. 31..... 33
State vs. Chitty, 1 S. C. (Bailey) 379.....35, 73
State vs. Clifford, 84 N. J. L. 595..... 33
State vs. Cockerham, 24 N. C. (Ired. L.) 204..... 34
State vs. Crook, 115 N. C. 760.....24, 34, 44, 80
State vs. Dalton, 109 Tenn. 544..... 36
State vs. Drew, 75 N. H. 402.....32, 44
State vs. Everitt, 164 N. C. 399..... 34
State vs. Fjolander, 125 Minn. 529..... 31
State vs. Frink, 1 Bay 168 35
State vs. Fulco, La. (1915); 67 So. 925 30
State vs. Hatley, 110 N. C. 522..... 34
State vs. Hawk, 47 W. Va. 434..... 36
State vs. Hilton, 151 N. C. 687.....34, 77, 78
State vs. Hockett, 129 Mo. App. 639..... 32
State vs. Johnson, N. C. (1915); 84 S. E. 767..... 34
State vs. Langum, 112 Minn. 121..... 31
State vs. Mallahan, 65 Wash. 287.....36, 67
State vs. Moise, 48 La. Ann. 109..... 30
State vs. Momsen, 153 Wis. 203..... 39
State vs. Murphy, 23 Nev. 390..... 32
State vs. Ray, 50 Ia. 520..... 29
State vs. Sapp, 87 Kan. 740..... 29
State vs. Smith, 173 Ind. 388..... 29
State vs. Sturgis, 110 Me. 96..... 30
State vs. Talberth, 109 Me. 575..... 30
State vs. Tripp, 168 N. C. 150..... 34
State vs. Vaughan, 71 Conn. 457..... 27
State vs. Voss, 80 Ia. 467 29
State vs. Warren, 92 N. C. 825..... 34
State vs. Waterman, 112 Minn. 157..... 31
State vs. Watson, 95 Mo. 411..... 32
State vs. White, 117 N. C. 804..... 34
Sterling vs. Drake, 29 O. S. 457, 462..... 35
Stuart vs. Laird, 1 Cranch 299.....61, 70
Sylvester vs. State, 65 N. H. 193..... 32

Tanner vs. Wiggins, 54 Fla. 203..... 27

PAGE.

Tayloe vs. Thomson's Lessee, 5 Pet. 358, 568..... 63
Thurman vs. State, 54 Ark. 120..... 26
Tuttle vs. Lang, 100 Me. 123..... 30

United States vs. Blaisdell, 3 Bened. 132 .....47, 48
United States vs. Fields, (unreported) 68
United States vs. Folsom, 8 N. Mex. 651..... 33
United States vs. Forsythe, (unreported) 68
United States vs. Gibert, 2 Sumner 19 48
United States vs. Gilbert, Fed. Cas. No. 15205....47, 48
United States vs. Jennegen, 4 Cranch C. C. 118 ....27, 48
United States vs. Lambert, 2 Cranch C. C. 137..27, 48, 59
United States vs. Maxwell, 3 Dill. 275, 278..... 60
United States vs. May, 2 McArthur 512..... 27
United States vs. Nye, 4 Fed. 888..... 60
United States vs. Patterson, 29 Fed. 775..... 58
United States vs. Phillips, 6 Peters 776..... 69
United States vs. Pile, 130 U. S. 280..... 45
United States vs. Wilson, 46 Fed. 748.....28, 47
United States vs. Wilson, 7 Peters 150, 160.....46, 65

Wall vs. Jones, 135 Ga. 425..... 28
Weaver vs. People, 33 Mich. 296..... 30
Weber vs. State, 58 O. S. 616.....35, 42, 44
Whisky Cases, 99 U. S. 594..... 47

American Law. Rev., Vol. 9, p. 600..... 17

Blackstone—Commentaries, Book IV, chap. 31..4, 8, 44, 50
Introduction, §2 20
Bryce—Essay on Roman and English Legislation..... 54

Chitty—Criminal Law, chap. 19, p. 757.....9, 15, 33, 53
Constitutions—Ohio 1802, 1851, 1913..... 43
Cnut—Laws of King Cnut..... 80

Dyer—See Anonymous cases.

Hale—Pleas of the Crown.....4, 13, 15, 19, 40, 44, 50
Vol. 1, p. 19 6
Vol. 1, p. 26 7
Vol. 1, chap. 27, p. 367 4
Vol. 2, p. 35 6
Vol. 2, chap. 42, p. 309 7

PAGE.

Vol. 2, chap. 56, p. 401 and note 5, 11
Vol. 2, chap. 58, p. 412 5
Hawkins—Pleas of the Crown 4, 14, 44, 50
Vol. 2, chap. 6, §8 . . ..8, 11
Vol. 2, chap. 15, §40 8
Vol. 2, chap. 15, §65 8
Vol. 2, chap. 33, §144 8
Vol. 2, chap. 51, §8 7

Journal of Criminal Law, Vol. 1, p. 438..... 80

Kenny—Outlines of Criminal Law, p. 485.....51, 79

Maine—Ancient Law, p. 367 79
Pollock's Note "D" 55

Pollock and Maitland—History of Eng. Law, 103 note.. 12

Statutes—3 Geo. 3, c. 15..... 8
§1081 Canadian Crim. Code 37
§2185 Burn's (Ind.) Statutes 29
§§13698, 13706, 13757 G. C. (Ohio)..... 42
Act of May 6, 1869—§13670 G. C. (Ohio)... 43
Act of Apr. 30, 1790, §31, (U. S.)..... 59
Act of Mar. 4, 1909 (U. S.)..... 59
Act of Feb. 13, 1913, chap. 50, §2, (U. S.).. 64
§722 R. S. (U. S.)..... 57
§§1042, 4046, 5069, 3296 R. S. (U. S.)..... 68
§269, H. R. 15578 64
Stephen—Hist. of Crim. Law of England, preface..... 53

Williams—Execution and Reprieve 10

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1915
No. 12 Original

EX PARTE THE UNITED STATES,

Petitioner.

BRIEF ON BEHALF OF RESPONDENT.

This is a mandamus proceeding brought in this court by the Attorney General for a peremptory writ against John M. Killits, Judge of the District Court for the Northern District of Ohio, Western Division, to require him to vacate a certain order suspending the execution of a sentence of imprisonment against one James J. Henahan.

The proceeding was brought to determine the power of district courts to suspend sentences.

Henahan was indicted on four counts for embezzlement from a national bank, the penalty for which, under §5209, R. S., was imprisonment for not less than five years on each count. He had made restitution to the bank and pleaded guilty, and, in accordance with the practice of State and Federal courts in Ohio, asked that he be given a suspended sentence, that is, that sentence be entered and its execution suspended.

Upon consideration of the facts and circumstances of the case, Judge Killits imposed the only sentence possible un-

der the statute, a concurrent sentence of five years, and entered an order suspending execution until the further order of the court.

The facts and circumstances moving the court to enter this order appear in the answer of Judge Killits.

My knowledge of the history and philosophy of our law is so limited, I present my views—ill arranged and sadly needing revision—with many misgivings, and regret that I cannot assert the law applicable to this case with the confidence of the Assistant Attorney General.

It has been the practice of courts to suspend sentence in one of two ways: first, by suspending imposition, and second, by suspending execution. Although in the case at bar, the court, following the practice common in State and Federal courts in Ohio, suspended execution of sentence, I shall discuss both the power to suspend imposition and the power to suspend execution as it seems that if the courts have one power, they must have the other.

The power of the courts in question in this suit is the power to suspend sentences indefinitely. The power to suspend sentences temporarily is recognized by all the authorities.

The power of a court to suspend sentence against the objection of a defendant is not raised by this record.

The power to suspend sentences capriciously does not exist and is not claimed.

The subject under consideration is naturally divided into three parts:

The extent of the exercise of this power at common law before its adoption in this country, the extent of the exercise of the power at the present time, and the exercise of the power by the Federal courts.

I shall discuss the subject under the following heads:

1. That the power existed and was exercised at common law, but if there is any question as to that, the propriety of the exercise of the power to suspend sentences indefinitely is now recognized.

2. That it is one of the implied powers of our Federal courts.

3. That by the continuous exercise of the power the statutes creating our Federal courts and those prescribing penalties for crimes have been construed in practice to admit the exercise of this power by the courts.

4. The exercise of this power is not an invasion of the pardoning power for the two powers existed and were exercised at common law and it has been determined by practical construction that the judicial exercise is not an invasion of the executive power.

5. The courts may retain jurisdiction after the close of terms of court for the purpose of completing the exercise of this power.

6. A defendant may have a right to a suspension of sentence in some circumstances.

7. What facts should be shown or appear to make it proper for a court to suspend a sentence.

There are many collateral questions which might be considered in an effort to reach a proper conclusion, but I believe the foregoing will serve as a sufficient outline of the points to be discussed in this brief.

There have been many decisions of State courts on the main question in this case, but they are so conflicting as to be of little value as a whole. In each case the court states

what it believes the common law to have been and proceeds from that to its own conclusion, either for or against the existence of this power. The conflicting conclusions of the State courts on this point are all based on the same authorities.

Under the directions of the respondent, I shall refer to authorities which are against my contentions, as well as those which are favorable.

1. The Power Existed and Was Exercised at Common Law, but if there is Any Question as to that, the Propriety of the Exercise of the Power to Suspend Sentences Indefinitely is Now Recognized.

To what extent did courts at common law exercise the power to suspend sentences in criminal cases?

Upon this subject the authorities I have been able to find are Hale's Pleas of the Crown, Hawkins' Pleas of the Crown, Blackstone's Commentaries, Chitty's Criminal Law and Dyer's Reports.

In *Hale's Pleas of the Crown,* Volume 1, Chapter XXVII, page 367, we find the following:

> "IV. Lastly, touching execution of judgments of treason, they are directed by the judgment, whereof before.
>
> "There be nevertheless some things, that accidentally happen, that suspend or abate the execution.
>
> "1. Reprieves *ex arbitrio regis vel judicis,* the king may by command or precept under his great or privy seal, privy signet, or sign manual, yea by signification under the hand of the secretary of state, or at this day by the subscription of a master of requests, command the reprieve of one condemned of treason or felony.
>
> "And altho the judge, by whom judgment is given, ought to be very cautious in granting a reprieve of one condemned for treason before him, yet he may, upon due circumstances do it, as well in case of treason, as felony.

"And this reprieve he may grant, and after he hath granted it may command execution after the sessions and adjournment of the commission. Dy. 205.

"There are other reprieves, which are not arbitrary, but *quasi de jure.*"

Hale then mentions two causes of reprieve *quasi de jure;* pregnancy in case a judgment in treason or felony is given against a woman, and insanity occurring between the judgment and the execution.

In *Chapter LVIII,* Volume 2, page 412, we find the following under the title "Concerning reprieves before or after judgment."

"Reprieves, or stays of judgment or execution are of three kinds, viz.:

I. *Ex mandato regis,* thus we find it done in 3 H. 7. 7. a. tho *ore tenus,* or by some message, or by sending his ring, but at this day it is ordinarily signified by the privy signet, or by the master of requests.

II. *Ex arbitrio judicis.* Sometimes the judge reprieves before judgment, as where he is not satisfied with the verdict, or the evidence is uncertain, or the indictment insufficient, or doubtful whether within clergy; and sometimes after judgment, if it be a small felony, tho out of clergy, or in order to a pardon or transportation. Crompt. Just. 22, b. and these arbitrary reprieves may be granted or taken off by the justices of goal-delivery, altho their sessions be adjourned or finished, and this by reason of common usage. Dy. 205 a.

III. *Ex necessitate legis,* which is a case of pregnancy, where a woman is convict of felony or treason."

In *Chapter LVI,* Volume 2, page 401, Hale discusses the power of a judge to give judgment upon a conviction before another judge and shows the enactment and effect of laws to permit this to be done.

"And, therefore, the statute of 1 E. 6, cap. 7 was made, which among other things enacts, 'That where any person shall be found guilty of treason or any

felony, for which judgment of death should be given, and be reprieved before judgment, new commissioners of goal-delivery may give judgment upon such conviction, as the justices of goal-delivery, before whom he was convicted, might have done.'

* * * * *

"Tho this statute in the first part thereof mentions giving of *judgment* upon a person convict, yet I take it very clear they may award *execution* upon a party reprieved after judgment by former commissioners, for by the second clause they may proceed in *every behalf* as the former commissioners might have done, and therefore there is little cause for the *quaere* made touching that point in Dyer 165 a., yet I have generally observed this one rule, that I would never give judgment, or award execution upon a person reprieved by any other judge but myself, because I could not know upon what ground or reason he reprieved him."

There is a note in the *First American Edition of Hale's Pleas of the Crown,* at this point, as follows:

"The usefulness of this caution may be seen from what is observed by Sir John Hawles in his remarks on Cornish's trial, State Tr. Vol. IV, p. 203, where he relates the case of some persons 'Who had been convicted of the murder of a person absent barely by inferences from foolish words and actions; but the judge before whom it was tried was so unsatisfied in the matter, because the body of the person supposed to be murdered was not to be found, that he reprieved the persons condemned; yet in a circuit afterwards a certain unwary judge, without inquiring into the reasons of the reprieve, ordered execution and the persons to be hanged in chains, which was done accordingly; and afterwards to his reproach the person supposed to be murdered appeared alive.' "

See also on the same point 2 Hale 35.

In *Volume 1,* page 19, in the discussion of infancy, Sir Matthew Hale says:

"That if he be above ten years and a half, and appears *doli capax,* yet if under fourteen years, he is not

> to be punished *poena ordinaria*, but it may have some relaxation *ex arbitrio judicis*. But although our law indulges a power to the judge to reprieve before or after judgment an infant convict of a capital offense in order to the King's pardon, yet it allows no arbitrary power to the judge to change the punishment that the law inflicts."

Again, at page 26, he says that an infant capable of knowing the difference between good and evil may be convicted and punished, yet the judge, according to the offense and circumstances, may or may not reprieve him before or after judgment in order to the obtaining of the King's pardon.

In *Vol. 2*, Chapter XLII, on page 309, Sir Matthew Hale discusses what is to be done in a case of an unreasonable verdict and says:

> "But what if a juror give a verdict against all reason, convicting or acquitting a person, indicted against evidence, what shall be done?. I say, if the jury will convict a man against or without evidence, and against the direction or opinion of the court, the court hath this salve to reprive the person convict before judgment, and to acquaint the king, and certify for his pardon."

In *Hawkins' Pleas of the Crown*, Volume 2, Chapter 51, § 8, the following is found:

> "SECT. 8. Eighthly. It seems agreed, That every court, which has power to award an execution, has also of common right a discretionary power of granting a reprieve; as where a person pleads a pardon defective in point of form, but sufficiently shewing the king's intention of mercy; or where it is doubtful whether the offense be not included in a general statute-pardon; or whether, as it is laid in the indictment, it amounts to so high a crime, as that with which the prisoner was charged. And it seems agreed at this day, That judges continue to have this power after their commission is determined."

In *2 Hawkins' Pleas of the Crown,* Section 144 of Chapter 33, it appears:

> "But the judges of assize, according to the circumstances of the case, frequently reprieved convicts tried before them, for the purpose of applying to the crown for a pardon, on condition that such convicts should be transported to America; in which case such convicts were obliged to lie in goal until the coming of the judges at the subsequent assize."

He also shows that to remedy this inconvenience, it was enacted by 3 Geo. 3, c. 15, that the intention of the crown in the matter might be certified to the judge who might then order immediate transportation.

In *2 Hawkins' Pleas of the Crown,* Section 8 of Chapter 6, this appears:

> "Also notwithstanding the commission of justices of goal-delivery be in strictness determined after the end of their session, yet it seems to be settled at this day, That they have power either to order the execution or reprieve of the persons who have been condemned before them."

In *2 Hawkins' Pleas of the Crown,* Section 40 of Chapter 15, this appears:

> "Also it seems, That the court of king's bench, or justices of goal-delivery, may bail a person convicted of manslaughter, or, as some say, of any other felony, for which he afterwards gets the king's pardon."

In *2 Hawkins' Pleas of the Crown,* Section 65 of Chapter 15, this appears:

> "Also if a man be convicted of manslaughter before such justices, (justices of goal-delivery) against plain evidence, it is said they may bail him till the next sessions of goal-delivery, in order to purchase his pardon in the meantime."

In *Blackstone's Commentaries,* Book IV, Chapter 31, we find the following:

"The only other remaining ways of avoiding the execution of the judgment are by a reprieve, or a pardon; whereof the former is temporary only, the latter permanent.

1. A reprieve, from *reprendre,* to take back, is the withdrawing of a sentence for an interval of time; whereby the execution is suspended. This may be, first, *ex arbitrio judicis;* either before or after judgment; as, where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient, or he is doubtful whether the offense be within clergy; or sometimes if it be a small felony, or any favorable circumstances appear in the criminal's character, in order to give room to apply to the crown for either an absolute or conditional pardon. These arbitrary reprieves may be granted or taken off by the justices of goal-delivery, although their session be finished, and their commission expired, but this rather by common usage, than of strict right."

Blackstone also mentions reprieves *ex necessitate legis,* such as the reprieve of a convicted woman in certain circumstances and the reprieve of an insane person.

In *1 Chitty's Criminal Law,* Chapter XIX, page 757, we find this:

"If the defendant does not succeed in reversing the judgment, there are yet two modes by which he can stay or prevent its execution. The first of these operates only in capital cases—a reprieve, which merely delays the execution; the second—a pardon, may be granted in any case, and is an absolute bar to punishment, as well as to all subsequent proceedings.

"The term *reprieve* is derived from *reprendre,* to keep back, and signifies the withdrawing of the sentence for an interval of time, and operates in delay of execution. It is granted either by the favor of his majesty himself, or the judge before whom the prisoner is tried on his behalf, or from the regular operation of law, in circumstances which render an immediate execution inconsistent with humanity or justice.

"This temporary mercy may be extended *ex mandatio regis,* or from the mere pleasure of the crown, expressed in any way to the court by whom the execu-

tion is to be awarded. This intention of his majesty may be signified *ore tenus*, by a verbal message, or by sending his ring in token of his design; but, at the present day, the intimation is usually made by the privy signet, or the master of the requests. On this the judge, of course, grants the prisoner a respite, either for a limited time, or during the pleasure of his majesty."

Chitty cites "Williams, J., Execution and Reprieve," referring to "The Whole Law Relative to the Duty and Office of a Justice of the Peace," by Thomas Walter Williams, the third edition of which was published, in 1812, and edited by H. Nuttal Tomlins.

I am informed that this work contains the following:

"It seems agreed that every court which has power to award an execution has also of common right a discretionary power of granting a reprieve as where a person pleads a pardon defective in point of form, but sufficiently showing the king's intention of mercy or when it is doubtful whether the offense be not included in a general statute pardon, or whether as it is laid in the indictment it amounts to so high a crime as that with which the prisoner was charged." 2 Hawk. c. 51, s. 8.

In *2 Dyer*, 235 a, it appears that during the fourth year of the reign of Queen Elizabeth (1561) a person killed his master and the word "*traiterously*" was not in the indictment. The court deemed the crime petit treason, and so within a general pardon by statute, and not murder which was excepted by the act.

"And upon this indictment of murder the party was arraigned and found guilty, and yet Walshe, justice, reprieved the prisoner without judgment at the last assizes, for which he was blamed by some, but without cause, as it seemed to the Judges."

In *2 Dyer*, 205 a. (about 1561) the question was submitted to the King's Bench, whether the justices of assize

could, after the session had adjourned, lawfully command the sheriff to respite the execution still longer. This appears:

> Hunt.
>
> "Justices of goal delivery who have respited a prisoner, may in vacation after the adjournment of the sessions make order for further respite, by the custom of the realm."
>
> "(5) It was moved by the Justices of assize there, if a thief be condemned to be hanged, and yet the Justices command the sheriff to respite his execution for six weeks only; and after the sessions adjourn, s. in the vacation before the six weeks expire, the said Justices command the sheriff to respite the execution still longer; *quaere*. Whether they can do this, because their commission of goal delivery seems to be finished by the adjournment; and it is usual to have a new commission every time they come to the sessions of goal delivery. And yet by the opinion of all the Justices the order of further respite is good enough; and the custom of the realm has always been so."

In *2 Dyer*, 165 a, there is:

> "Also *quaere*, if Justices of Oyer or Goal-delivery reprieve any prisoner after judgment of death, whether the new justices may command execution upon him by reason of the words of the statute, which are of reprieves before judgment."

This point was discussed by *Hale* in Volume 2, Chapter LVI, page 401, and by *Hawkins* in Volume 2, Chapter 6, § 8.

These are all the authorities I have been able to find and the question is, do these sustain the power to indefinitely suspend sentences? I must confess I cannot satisfactorily answer the question. It does seem that from the use of the word "reprieve," a definite, rather than an indefinite suspension was meant, but, on the other hand, it must be noticed that judicial reprieves were either arbitrary or from the necessities of the law; that is, either *ex arbitrio judicis* or *ex necessitate legis*.

Reprieves were granted by the King or by the judges, and if by the judges, were either discretionary with them or from the necessities of the law.

Reprieves *ex necessitate legis* covered all the cases which are now covered by temporary suspensions. In a case of insanity a temporary suspension would provide time to make the necessary inquest. In case of pregnancy of a woman convicted of a crime a temporary suspension for a definite time would be sufficient. If appeals could have been taken at common law, a definite suspension would have protected the defendant, pending his appeal. By a definite or temporary suspension the courts can obtain the time necessary for the consideration of the sentence to be imposed.

Reprieves *ex necessitate legis* were of great antiquity and seem to have come from the Roman law.

See:

1 Pollock and Maitland, 103 note.

I believe reprieves *ex necessitate legis* were granted when according to the term the necessities of the law required, but reprieves *ex arbitrio judicis* were granted in those cases in which otherwise injustice would be done.

This I believe to have been the means used by the courts in extraordinary cases to prevent the enforcement of the law resulting in injustice. Is not the prevention of injustice one of the necessities of the law?

It seems to me the courts assumed the power to administer justice and exercised the power to reprieve whenever it appeared that injustice would result from a judgment of conviction or the execution of such a judgment.

I understand perfectly that criminal jurisdiction is the power and authority constitutionally conferred upon a court to take cognizance of an offense and to pronounce the judgment or sentence provided by law, but I believe the common law in the interests of justice provided for the exceptional

cases by this power, or, to put it another way, the sentences fixed by statute law were subject to the exceptions which could be made by the exercise of this power.

The Supreme Court of New Jersey in the *Addy* case, *post*, says:

> "It would seem that it is stating the matter too broadly to assert that it is always the imperative duty of a court to render judgment upon a conviction of crime, unless some legal proceeding for review be interposed. Considerations of public policy may induce the court to stay its hand."

It appears in Hale that reprieves *ex arbitrio judicis* were granted both before and after judgment. If the courts were entirely lacking authority and were obliged to enforce the letter of the law in all cases, how could they reprieve before judgment, and particularly how could they reprieve for any purpose except to allow time for the exercise of the King's prerogative to pardon?

It appears in Hale, however, that sometimes a judge reprieved before judgment, as where he was not satisfied with the verdict, or the evidence was uncertain, or the indictment insufficient, or doubtful whether within clergy, and sometimes after judgment, if it be a small felony, though out of clergy, *or in order to a pardon or transportation.*

It seems clear from this that these arbitrary reprieves were not limited to cases in which a pardon was to be sought, for Hale says the power could be exercised in certain circumstances, *"or in order to a pardon or transportation."*

But, in another place, we find Hale states that judges had no arbitrary power to change the punishment the law inflicted, even against an infant, but should reprieve in order to the King's pardon, and so in case of an injust verdict, the judge should reprieve before judgment and acquaint the King and certify for his pardon.

Of course, it must be remembered that in certain cases pardons were granted as a matter of right, and in many cases

the request for the King's pardon was made as a matter of form and courtesy and not because the pardon might be denied.

For instance, one who committed homicide in self-defense could not be acquitted, but must be found guilty and allowed to seek the King's pardon.

It may be that in many instances convicts were allowed to go on reprieves, possibly in order to the King's pardon, and they never asked or cared for a pardon.

With us an accomplice who testifies for the prosecution is entitled to have his trial postponed, so that he may apply for a pardon to which he is entitled *ex debito justitiae*, but it is doubtful if the records of pardons in the Department of Justice will show one case in a hundred in which a pardon was asked on that ground.

Hawkins says that every court which has power to award an execution has also of common right a discretionary power of granting a reprieve.

He does not state clearly that reprieves were granted only in order that the convicted persons might seek pardons, but it is shown that that was one of the purposes for which reprieves were granted.

It appears that judges bailed convicts pending their application for pardon.

Whether or not reprieves were granted in cases in which pardons were not to be sought, it must be remembered that pardons then were purchasable and in many cases were granted as a matter of right.

It also seems important to note that the award of execution was a judicial act and that the court, having the power to award execution, also had the power to grant a reprieve.

See:

Clifford vs. Heller, 63 N. J. L., 105 (1899);
Contra as to Magistrate.
Re Thomas Lynch, 12 Can. Crim. Cas., 141.

If the court was bound to cause the penalty of the law to be executed, the award of execution would appear to be ministerial rather than judicial.

Chitty says the term reprieve signifies the withdrawal of the sentence for a limited time, and operates in delay of execution and a reprieve may be granted in circumstances which render an immediate execution inconsistent with humanity or justice.

If humanity and justice may require a temporary reprieve, why not an indefinite suspension or reprieve?

Any penalty whatsoever may be inhuman and unjust, and if so, why not suspend the whole penalty indefinitely instead of for a definite time? If the courts had power to do justice in circumstances in which the enforcement of the law would be unjust, they must have had the power to indefinitely suspend sentences in some cases.

Chitty says reprieves were granted only in capital cases, but Hale says that reprieves were granted after judgment of conviction of small felonies.

In Dyer's Reports, it clearly appears that the justices controlled execution of judgments.

The most important case is reported in 2 Dyer, 235 a, from which it appears that a prisoner was reprieved without judgment by a judge, for which he was criticized by some, but his action was approved by the judges. He certainly could not have been subject to censure if he had merely reprieved the prisoner for a definite period.

Some of the English cases have an important bearing on this question.

It seems reasonable to assume that the English courts have had a continuous memory of their proper powers and practices. It is not likely the English judges would assume to exercise this power unless there was good reason or precedent for it. In this view I cite three English authorities.

Keen vs. Queen, 10 Q. B., 928 (1847), merely holds that a Court of Quarter Sessions may respite a judgment from one Session to another to determine the judgment to be entered.

Two English courts held they had the power to suspend the imposition of sentence indefinitely.

In *Queen vs. Richardson,* 8 Dowling's Practice Cases, 511 (1840), the defendants were indicted for conspiring to publish libels to extort money. One defendant pleaded guilty on condition of being discharged, on entering into his own recognizance to appear and receive judgment when called on, and that he should not be called on at all, if he discontinued the publication of libels upon the prosecutor.

The Queen's counsel asked the judgment of the court upon the defendants.

> "Jervis, on behalf of H. Richardson, objected, that that course was irregular. This defendant pleaded guilty to part of the charge against him, on condition that he should not be called up to receive judgment, if he ceased publishing libels on the prosecutor. From that time to the present, he has complied with the condition of his recognizance, and has ceased to have any connexion with the paper in question. The object of the prosecutor in adopting the present course is, to obtain the costs, which he cannot have, till judgment has been pronounced upon the defendants; but as no arrangement was made respecting costs, that is no ground for proceeding."
>
> "Lord Denman, C. J.—It ought, we think, to appear by affidavit that this defendant has written something of a libellous nature upon the prosecutor, since entering into his recognizance not to do so; if it does not appear that he has published any such libel since the trial, the Court will not feel called on to pronounce judgment. As to costs, they should have been taken care of at the time; it is much better that such things should be clearly expressed in writing, than be left to mere vague and general understanding."
>
> "As to this defendant, the Court gave no judgment."

In *Regina vs. Ryan,* 7 Cox Crim. Cas., 109 (1855), an

was "put forward;" whereupon the Queen's Counsel stated that before proceeding with the case he thought it right to mention that there had been a previous conviction against the prisoner upon which judgment had not been pronounced; and if the court would now proceed to pass sentence, the ends of justice might be effected without proceeding with the present indictment.

It appeared that the former indictment against defendant was for stabbing his wife and upon his agreement to behave, the Counsel for the Crown consented to his being discharged without receiving sentence on his entering into the usual recognizance to appear and abide the judgment of the court whenever duly summoned.

As the defendant had not kept his promise, but had made a more serious attack upon his wife, the Queen's counsel moved the court that judgment should be passed upon the prisoner, and as evidence of the prisoner's breach of understanding, the finding of the second indictment might be taken into consideration by the court.

After the entries on the records were read, the prisoner was asked if he had anything to say why judgment should not be pronounced, and the prisoner made a statement:

Monahan, C. J., said:

> "We are going to sentence you for the crime to which you pleaded guilty on June last."

Sentence of four years' imprisonment followed.

In *9 American Law Review*, 600 (1875), is to be found a report of a suspension of imposition of a sentence in England.

> "A Scene at The Chester Assizes.—An occurrence perhaps without a parallel was witnessed at the close of the assizes at Chester, of which the Manchester Guardian gives the following account:—
>
> 'Mary Lancaster, thirty-three, was indicted for the manslaughter of her husband, John Lancaster, at Birkenhead. The deceased had long led the prisoner

a wretched life; and on the 13th of September he came home drunk, and kicked over the meat which she was preparing for his dinner. He then thrashed her, and in a passion the prisoner threw at him a sharpening steel, and caused his death. The prisoner was a hard-working woman, and, in spite of her husband's brutal treatment of her, had done her best to make his home comfortable. The jury found the prisoner guilty. Mr. Justice Brett, addressing the prisoner, then said. I believe that if I thought it right to act according to my own feelings, I should say nothing about this unhappy husband of yours. As far as I can see, you were a respectable, hard-working, well-behaved wife, and I feel bound to say a greater brute than your husband was I have seldom heard of. There are circumstances in the depositions even worse than those which have been brought forward. They show that, even on the very last day you were together, you were doing all you could to make his home comfortable, and to make him happy. With a brutality which made me shudder when I read it, he cast away that which you had prepared for him. He has been beating and ill-treating you for months, probably for years; and it is nothing but the tenderness and forgiveness of the woman and wife which prevented you from having him punished for crimes he committed against you time after time. It is only when he had driven you to desperation by ill-treating you the whole day, and I dare say was on the point of ill-treating you again, that you, in a moment of passion, took up a formidable weapon and threw it at him, I believe, without the intention of striking him. It did strike him, and you immediately ran for assistance, and did all you could to save him. All the real right in this case was on your side; all the real wrong on your husband's; and God forbid that I should punish you. I will be no party to it; I will not even make this judgment complete; I will not allow it to be said by anybody that you are a convicted felon (hear, hear),—for a conviction is not complete until a sentence is passed, and I mean to pass no sentence at all. (Loud cheering, which for some time the officials of the court vainly endeavored to suppress.) I shall merely ask you to enter into your own recognizance to come up

> for judgment if called upon, and nobody in the world will ever call upon you,—God forbid they ever should. (Renewed cheering, during which the prisoner left the dock.)'"

This instance of the exercise of this power by one of the most distinguished English Judges and Hale's statement that the power was exercised in cases of treason would seem to answer the fear expressed on page nine of the government's brief, that if the power may be exercised in minor offenses, it may also be used in cases of murder, treason and the graver offenses.

The character of the offense does not furnish the test, but rather the facts and circumstances making the imposition or execution of sentence unjust.

The English courts seem to have exercised the right to suspend the imposition of sentence or judgment in cases against the inhabitants of a community for failure to repair bridges or roads and in one case a judgment of acquittal was suspended.

See:

> King vs. Inhabitants of Wandsworth, 1 Barnewall & Alderson, 63 (1817).
>
> Rex vs. Inhabitants of Southampton, 2 Chitty, 215 (1818).

I have been unable to find any other English authorities, except a note to the case of *King vs. Inhabitants of the County of Oxford*, 13 East, 411 (1811), in which it is said:

> "In capital cases at the assizes, if a conviction take place upon insufficient evidence, the common course is to apply to the Crown for a pardon, upon a full report of the evidence sent in by the learned Judge to the Secretary of State for the home department; but I am not aware of any instance of a new trial granted in a capital case; and upon the debate of all the Judges in Margaret Tinkler's case, in 1781, it seemed to be considered that it could not be. The authorities are

> numerous that an inferior jurisdiction cannot grant a new trial upon the merits, but only for an irregularity."

The conclusion of common law judges that they had the power to grant arbitrary reprieves may have been founded upon a recognition of the law of nature.

Blackstone (Introduction § 2) says:

> "This law of nature, being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times; no human laws are of any validity, if contrary to this, and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original."

The respondent is not claiming under the law of nature, but suggests it merely as a possible foundation of the early authorities which recognize the existence of the power now in question.

As pointed out in the brief on behalf of the government, respondent's oath of office was to *"administer justice,"* but he submits to this court the question whether the strict execution of the penalties of the law is necessarily justice, and whether justice does not require the existence and the exercise of the power in question, so that by the strict enforcement of the laws, injustice may not be done.

I do not believe that any additional authorities can be cited or information furnished to show the form and extent of the exercise of this power at common law.

The modern cases in which this question has been considered are all based on these authorities and some hold that the power existed at common law and others the opposite.

A quotation from a decision by Hon. Lindley M. Garrison, sitting as Vice-Chancellor of the Court of Chancery of New Jersey, will give this court a clear understanding of the conflict of modern decisions.

In *Gehrmann vs. Osborne*, 79 N. J. Eq., 430 (1912), he said:

"Upon the question of whether or not a court, irrespective of legislation, has power to suspend sentence indefinitely, authorities differ. Since there is no statute in this state upon the subject, it must be determined by what we find the common law to be.

Upon this subject, there is great contrariety of opinion and direct conflict of decision. Some of the courts draw the inference from the English precedents that at the common law, as there administered, there was nothing in the nature of an indefinite suspension of sentence. Other courts, from the same sources, draw an exactly opposite inference. Some deny that there was any power to suspend sentence at all; others say that there was power to do so temporarily; while others say that there was power to do so indefinitely.

"Such original investigation into the English authorities as I had time to make did not serve to satisfy me that the situation, as there existing, was clearly ascertainable. There is little in the books upon the subject, and much is left to inference. Enough, however, can be gathered from the English precedents to show that courts of criminal jurisdiction exercised the power of delaying the imposition of a sentence for various reasons, and of delaying the operation of an imposed sentence, and did not do this by virtue of any statute, and therefore must have inherently had the power so to do. Each other jurisdiction has determined for itself whether, according to the common law, custom and usage therein, the courts thereof have the power to suspend the pronouncing of a sentence (or to suspend the execution of a pronounced sentence), or have not such power. In each group will be found cases in which the power, if found to exist, or the lack of it, if found not to exist, is traced to the common law as practiced in the English courts; while other cases in each group will be found which affirm or deny the power in accordance with custom, usage, or the practice of the common law, as found to exist in their jurisdictions. In the following cases, it will be found that the courts, for one reason or another, has denied that the court had power to suspend the pronouncing of sentence. *People vs. Morrisette* (N. Y. O. & T.), 20 How. Prac.,

118; *People vs. Allen* (Ill. 1895), 155 Ill., 61, 39 N. E., 568, 41 L. R. A., 473; *People vs. Blackburn*, 6 Utah, 347, 23 Pac., 759; *People vs. Brown*, 54 Mich., 15, 19 N. W., 571; *U. S. vs. Wilson* (C. C.) 46 Fed., 748; *Gray vs. State*, 107 Ind., 177, 8 N. E., 16; *Ex Parte Peterson* (1911), 19 Idaho, 433, 113 Pac., 729, 33 L. R. A. (N. S.), 1067; *State vs. Hilton* (1909), 151 N. C., 687, 65 S. E. 1011; *State vs. Hockett*, 129 Mo. App., 639, 108 S. W., 599.

"In the following cases, the court has held that it had the power to suspend the pronouncing of a sentence: *People ex rel. Forsythe vs. Ct. of Sessions*, 141 N. Y., 291, 36 N. E. 386, 29 L. Ed., 107, 23 L. R. A., 856; *State vs. Drew*, 75 N. H., 402, 74 Atl., 875; *Iowa vs. Voss* (1890), 80 Iowa, 467, 45 N. W., 898, 8 L. R. A., 768; *People vs. Mueller*, 15 Chicago Leg. N., 364; *Weaver vs. People*, 33 Mich., 297; *Re Webb* (1895), 89 Wis., 354, 62 N. W., 177, 27 L. R. A., 356, 46 Am. St. Rep., 846; *State vs. Crook* (1894), 115 N. C., 760, 20 S. E., 513, 29 L. R. A., 260; *Weber vs. Ohio* (1898), 58 Ohio St. 616, 51 N. E. 116, 41 L. R. A. 472; *Green vs. State* (1908), 88 Ark., 290, 114 S. W. 477; *Commonwealth vs. Dowdican*, 115 Mass., 136; *Marks vs. Wentworth* (1908), 199 Mass., 44; 85 N. E. 81; *Ex Parte St. Hilaire* (1906), 101 Me., 522; 64 Atl. 822, 8 Ann. Cas. 385.

"The following cases concern the power of a court to suspend the execution of an imposed sentence; some holding that it has the power, and others that it has not: *Ex parte Clendenning*, 22 Okla. 108, 97 Pac. 650, 19 L. R. A. (N. S.) 1041, 132 Am. St. Rep. 628; *Clifford vs. Heller* (Sup. Ct. 1899), 63 N. J. Law, 105, at page 116, 42 Atl. 155, 57 L. R. A. 312; *People vs. Cummings*, 14 L. R. A., 285; notes; *State vs. Voss, supra; Re Webb, supra; Neal vs. Georgia* (1898), 104 Ga. 509, 30 S. E. 858; 42 L. R. A. 190, 69 Am. St. Rep., 175; *Weaver vs. Ohio, supra; State vs. Abbott* (1911), 87 S. C. 466, 70 S. E. 6, 33 L. R. A. (N. S.) 112; *Wall vs. Jones* (1910), 135 Ga. 425, 69 S. E. 548; *Ex parte Cornwall*, 223 Mo. 259, 122 S. W. 666, 135 Am. St. Rep. 507; *State vs. Smith* (1910), 173 Ind., 388; 90 N. E., 607; *Tanner vs. Wiggins* (1907), 54 Fla. 203, 45 South. 459, 14 Ann. Cass., 718.

"Since the cases as cited above which affirm the power are properly based upon a finding of the exist-

ence of such power in the court by virtue of the custom, usage, and the common law as administered in that court, the next inquiry is, What is the fact with respect to our own state?

"From such inquiry as I have made I find that an indefinite suspension of sentencing has been the custom in this jurisdiction beyond the memory of those now connected with the administration or practice of the criminal law in this state. Such references as are made to the matter in reported cases bear out the inference that such custom has been one of long existence in this jurisdiction. *State vs. Addy, supra; State vs. Henson, supra.* (Collins, J., in dissenting opinion, 66 N. J. Law, 610, 50 Atl., 616); *Blazier vs. Keffer, supra. Clifford vs. Heller, supra.*

"The conclusion which I have therefore reached is that in the state of New Jersey if a defendant has pleaded *nolo contendere*, or guilty, or has been convicted upon trial, the court has the power, if the defendant does not object thereto, and therefore is assumed to assent thereto, to refrain from pronouncing a judgment or sentence, and may, at a subsequent time, hale the defendant before it, and impose the punishment in the same manner that it would have been justified in pronouncing it upon the very day when the case was first ripe for sentence."

In *People ex rel. vs. Court of Sessions,* 141 N. Y. 288, 293 (1894), Judge O'Brien said:

"Without attempting to collate all the authorities on the subject, it is sufficient to say that the power to suspend sentence at common law is asserted by writers of acknowledged authority on criminal jurisprudence, by the uniform practice of the courts and numerous adjudged cases."

I believe the continuous exercise of the power by our judges furnishes the best reason for the belief that the power existed and was exercised in its present form at common law.

The Assistant Attorney General in his brief uses this statement:

"This claim, however, lacks historical justification, and such suspension is a pure usurpation, the anomalous character of which is frequently recognized."

I cannot believe that our judges have knowingly usurped this power, and when I find it has been exercised, in one form or another, by judges, such as Justices Brown, Matthews, Lurton, Jackson and Blatchford before they came on this court and by other State and Federal judges of the highest standing, and by Mr. Justice Brett, afterwards Lord Esher, I am forced to believe they had good authority for their acts, and in the absence of recorded precedent, I must believe that this has been one of the traditions handed down from one judge to another. I believe that if the records of our courts were searched this would be demonstrated. I cannot understand, upon any other theory, the English cases I have cited, for it does not seem probable that those judges would have allowed reports of those cases to be printed had they understood they were usurping powers that belonged to the Crown.

Respondent does not claim the power to capriciously suspend sentence and there is no authority for such exercise of the power. This is not the only power vested in our courts without definite limitations, but to be exercised only in proper circumstances.

Judge O'Brien in the New York case said:

> "It is a power which the court should possess in furtherance of justice, to be used wisely and discreetly, and it is perhaps creditable to the administration of justice in such cases that while the power has always existed, no complaint has been heard of its abuse."

In *State vs. Crook*, 115 N. C., 760 (1894), the Supreme Court of North Carolina said:

> "The exercise of this discretionary power has not heretofore been questioned, and the beneficial effects of its judicious use have been made so manifest as to commend it both to the Judges and the people."

This court in many cases has refused to lay down hard and fast rules for the exercise of discretionary powers by judges and has deemed it sufficient to say that they should not

be exercised capriciously or arbitrarily but in conformity with the general rules which have been sufficient guidance for the courts in the past.

In view of the claim that the old authorities do not clearly establish the exercise of this broad power at common law, the court should consider the possible reasons for the lack of definite precedent. It may have been the common practice and still no record might be left in the form of decisions. Judge Brown, later Justice Brown, suspended sentences in four hundred and fifty-six cases, while sitting as District Judge in Detroit, but there is no reported decision to be found in any of the cases. It should be noted that there is but one reported Federal decision on this point in the whole country though the power has been exercised in a great many hundred cases. This may have also occurred at common law and it seems is likely to have been the case since there were, no doubt, but few criminal cases in which the exercise of the power would be proper.

It is my conclusion, supported by several of our State decisions and these old authorities, that the power was exercised at common law in the form and to the extent now complained of.

A brief summary of State decisions is here given. While no general rule may be deduced from them, it seems clear that the trend of opinion favors the exercise of the discretion in one form or another.

Arkansas.

The courts have power to suspend imposition of sentences and to sentence at a term subsequent to that at which plea or verdict was entered.

Cox vs. State, Ark. (1914), 169 S. W., 789;
Barwick vs. State, 107 Ark., 115 (1913);
Joiner vs. State, 94 Ark., 198 (1910);

Greene vs. State, 88 Ark., 290 (1908);
Thurman vs. State, 54 Ark., 120 (1891);

See:

Phillips vs. State, Ark. (1911), 140 S. W., 734.

California.

Sentence need not be imposed at the same term at which verdict of guilty is found. A defendant may waive his right to be immediately sentenced as required by statute. Imposition of sentence may be suspended.

People vs. Patrich, 118 Cal., 332 (1897);
People vs. Robinson, 46 Cal., 94 (1873);
People vs. Felix, 45 Cal., 163 (1872);
People vs. Robertson, 6 Cal. App., 514 (1907);

See:

Ex parte James Morton, 132 Cal., 346 (1901).
In re Giannini, 18 Cal. App. 166 (1912).

An order suspending execution of sentence by withholding commitment may be revoked and sentence enforced.

In re Collins, 8 Cal. App., 367 (1908).

Colorado.

It is held that sentence must be imposed during the term in which plea or verdict is entered, and sentence cannot be postponed even at the request of the defendant, and that passing the case beyond the term results in loss of jurisdiction.

The *Mann* case, so often cited, has no bearing on the question. In that case there was no order of suspension. Judgment was entered, but, in anticipation of an appeal, no commitment was issued. Mandamus proceedings were brought to require the issuance of a commitment.

Grundel vs. People, 33 Colo., 191 (1905);
Mann vs. People, 16 Colo. App., 475 (1901).

Connecticut.

No reported case in point is to be found, but it is held that courts may suspend execution of sentence to allow an appeal to be taken. The discussion of the common law power to bail after conviction and sentence is interesting.

State vs. Vaughan, 71 Conn., 457 (1899).

See:

Belden vs. Hugo, Conn. (1914), 91 Atl., 369.

District of Columbia.

Sentence may be imposed at a subsequent term, and it seems imposition of sentence may be suspended.

Harris vs. Lang, 27 App. D. C., 84 (1906);
Harris vs. Nixon, 27 App. D. C., 94 (1906);
United States vs. May, 2 McArthur, 512 (1876);

See:

United States vs. Lambert, 2 Cranch C. C. 137, Fed. Cas. No. 15554 (1817);
United States vs. Jennegen, 4 Cranch C. C. 118, Fed. Cas. No. 15474 (1830);
Miller vs. United States, 41 App. D. C. 52 (1913).

Florida.

The imposition of sentence may be suspended, but not the execution of sentence.

Ex parte Williams, 26 Fla., 310 (1890);
Tanner vs. Wiggins, 54 Fla., 203 (1907).

Georgia.

It seems that imposition of sentence may be suspended. but not the execution of sentence. It is held that an order suspending execution of a sentence is void, and sentence may be enforced, and that jurisdiction to enforce the sentence is not lost.

Daniel vs. Persons, 137 Ga., 826 (1912);

Roberts vs. Wansley, 137 Ga., 439 (1912);
Wall vs. Jones, 135 Ga., 425 (1910);
O'Dwyer vs. Kelly, 133 Ga., 824 (1910);
Gordon vs. Johnson, 126 Ga., 584 (1906);
Neal vs. State, 104 Ga., 509 (1898);

See:

Hancock vs. Rogers, 140 Ga., 688 (1913).

Hawaii.

Courts have no power to indefinitely suspend imposition of a sentence and lose jurisdiction by doing so. Temporary and definite suspensions may be made.

Republic of Hawaii vs. Pedro, 11 Hawaii, 287 (1898).

Idaho.

Courts are without power to suspend execution of sentence and jurisdiction is lost by releasing a defendant from custody.

The case of *United States vs. Wilson* should be classed as an Idaho decision, as it turned on the Idaho statutes. That decision denies the power to suspend the execution of a sentence.

In re Peterson, 19 Idaho, 433 (1911);
United States vs. Wilson, 46 Fed., 748 (1891).

Illinois.

The power to indefinitely suspend imposition of sentence is denied in the *Barrett* and *Allen* cases, and, *obiter*, it is said that execution of sentence may not be suspended.

It is held that jurisdiction is lost by long delay, notwithstanding the consent of defendant.

The same court holds constitutional a statute permitting suspended sentences.

It is submitted that the decision of Barnum, J., in the *Mueller* case, upholding the power is better reasoned.

People vs. Mueller, 4 Crim. Law Mag. 725; 15 Chi. Leg. News 364 (1883);

People vs. Allen, 155 Ill. 61 (1895);
People vs. Barrett, 202 Ill. 287 (1903);
People vs. Heise, 257 Ill. 443, 450 (1913).

Indiana.

It seems the courts have no power to suspend the imposition of sentence. It was first held that execution of sentence could not be stayed pending an appeal, but that decision was later overruled. The matter is now regulated by statute.

Gray vs. State, 107 Ind. 177 (1886);

See:

Butler vs. State, 97 Ind. 373 (1884);
Parker vs. State, 135 Ind. 534 (1893);
State vs. Smith, 173 Ind. 388 (1910);
§ 2185 Burn's Statutes.

Iowa.

It seems from the *Ray* case and *dicta* in the *Voss* case that imposition of sentence may be suspended, but it was held in a contempt case that execution of sentence could not be suspended. In the *Evans* case it is held that jurisdiction is not lost by delay in enforcing a sentence.

Miller vs. Evans, 115 Ia. 101 (1901);
State vs. Voss, 80 Ia. 467 (1890);
State vs. Ray, 50 Ia. 520 (1879).

Kansas.

The power to suspend imposition of sentence and execution of sentence is denied. Delay in imposing sentence results in loss of jurisdiction.

In re Strickler, 51 Kan. 700 (1893);
In re Beck, 63 Kan. 57 (1901);
State ex rel. vs. Sapp, 87 Kan., 740 (1912).

Kentucky.

An order suspending execution of sentence is void, as an invasion of the governor's power to pardon and reprieve.

Brabandt vs. Commonwealth, 157 Ky. 130 (1914).

Louisiana.

There are no decisions in point, but *dicta* indicating a denial of the power as an invasion of the governor's power to pardon.

State ex rel. vs. Moise, 48 La. Ann. 109 (1895).

See:

State vs. Fulco, La. (1915), 67 So. 925.

Maine.

The prevailing practice is that of placing the indictment on file and suspending imposition of sentence. This has been held to be proper, but power to suspend execution is denied.

Tuttle vs. Lang, 100 Me. 123 (1905);
St. Hilaire, Petitioner, 101 Me. 522 (1906);
State vs. Sturgis, 110 Me. 96 (1912);
State vs. Talberth, 109 Me. 575 (1912).

Massachusetts.

With the consent of a defendant, but not against his objection, a court of general jurisdiction may suspend imposition of sentence by laying the indictment on file.

Commonwealth vs. Dowdican's Bail, 115 Mass. 133 (1874);
Commonwealth vs. Maloney, 145 Mass. 205 (1887);
Marks vs. Wentworth, 199 Mass., 44 (1908).

Michigan.

The early decisions are confusing, but the practice in fact exists and is sustained by the later decisions.

People vs. Stickle, 156 Mich. 557 (1909);
People vs. Kennedy, 58 Mich. 372 (1885);
People vs. Brown, 54 Mich. 15 (1884);
People vs. Reilly, 53 Mich. 260 (1884);
Weaver vs. People, 33 Mich. 296 (1876);

See:

People vs. Cummings, 88 Mich. 249 (1891);
People vs. Dudley, 173 Mich. 389 (1912).

Minnesota.

The practice is now regulated by statute. There are no decisions in point, but merely *dicta* against the power to suspend indefinitely, although it is held that the right to enforce execution of a sentence continues until the sentence is fully executed.

In re Shaw, 31 Minn., 44 (1883);
State ex rel. vs. Langum, 112 Minn. 121 (1910);
State vs. Waterman, 112 Minn. 157 (1910);
State vs. Fjolander, 125 Minn. 529 (1914).

Mississippi.

Courts have no power to suspend either the imposition or execution of sentences. An order suspending execution of sentence is void and does not affect the sentence or judgment and the defendant may be retaken as on an escape and compelled to perform his sentence. The suspension of imposition of sentence will be treated as a continuance by consent. The first decision in the *Fuller* case upheld the power, but on rehearing the power was denied.

Gibson vs. State, 68 Miss. 241 (1890);
Fuller vs. State, 100 Miss. 811 (1912); 57 So. 6, 806;
Hoggett vs. State, 101 Miss., 269 (1912), 57 So. 9, 811.

Missouri.

It seems that the courts do not have power to suspend either the imposition or the execution of sentence. Long delay in imposing sentence even with the consent of the defendant results in a loss of jurisdiction.

While an order suspending the execution of a sentence is void, delay alone does not result in a loss of jurisdiction, but when such delay has occurred and circumstances are such that society could derive no good from the enforcement of a sentence, a court may refuse to order the execution of sentence.

State vs. Watson, 95 Mo. 411 (1888);
State vs. Hockett, 129 Mo. App. 639 (1908);
Ex parte Bugg, Mo. App. (1912); 145 S. W., 831;

See:

Ex parte Cornwall, 223 Mo. 259 (1909).
Ex parte Parker, 106 Mo. 551 (1891).

Nevada.

In a suit on a bail bond given to perform a suspended sentence it was held the court was without power to stay execution of sentence in view of a statute providing sentence should go into effect immediately.

State vs. Murphy, 23 Nevada 390 (1897).

New Hampshire.

Courts may suspend either the imposition or execution of sentences.

State ex rel. vs. Drew, 75 N. H. 402 (1909);
Sylvester vs. State, 65 N. H. 193 (1889).

New Jersey.

Imposition of sentence may be suspended by a court of general jurisdiction if the defendant consents or does not object, and it seems execution of sentence may be suspended as it is held that the order for the execution of a sentence is a judicial act.

State vs. Addy, 43 N. J. L. 113 (1881);
Gehrmann vs. Osborne, 79 N. J. Eq. 430 (1912);

Blazier vs. Keffer, 79 N. J. L. 252 (1910);
State vs. Brewer, N. J. L. (1904); 59 Atl., 31;
Clifford vs. Heller, 63 N. J. L. 105 (1899);
State vs. Clifford, 84 N. J. L. 595 (1913).

New Mexico.

In the *Folsom* case it was held that execution of sentence could not be suspended, but Judge Pope, now United States District Judge in New Mexico, while sitting judge of the District Court of Chaves County, held the contrary in an unreported case, *"In re Carl Leopold"*, decided December 20, 1909. The power was denied in the *Lujan* case.

United States vs. Folsom, 8 N. Mex. 651 (1896);
In re Carl Leopold, unreported, (1909);
In re Lujan, 18 N. Mex., 310 (1913);
Ex parte Bates, N. Mex. (1915), 151 Pac. 698.

New York.

Courts may suspend either the imposition or execution of sentence.

People vs. Whipple, 9 Cowen 707, 715 (1827);
Miller's Case, 9 Cowen 730 (1828);
People ex rel. vs. Court of Sessions, 141 N. Y. 288 (1894);
People ex rel. vs. Court of Sessions, 66 Hun. 550 (1893);
People ex rel. vs. Court of Sessions, 8 N. Y. Crim. Rep. 355 (1892);
Carnal vs. People, 1 Parker's Crim. Rep. 262 (1851);
People ex rel. vs. Webster, 14 Misc. 617 (1895);
People vs. Harrington, 15 Abb. N. C. 161 (1884);

People vs. Morrisette, 20 How. Pr. 118 (1860);
People ex rel. vs. Flynn, 55 Misc. 639 (1907);
People vs. Graves, 31 Hun. 382 (1884);
People vs. Reed, et al., 1 City Hall Recorder 4, 6, 21, 28, 41 (1816);
People vs. Goodrich, 149 N. Y. Supp. 406 (1914).

North Carolina.

The courts approve the practice of suspending either the imposition or execution of sentences with the consent of defendants.

State vs. Hilton, 151 N. C. 687 (1909);
State vs. White, 117 N. C. 804 (1895);
State vs. Crook, 115 N. C. 760 (1894);
State vs. Warren, 92 N. C. 825 (1885);
State vs. Cockerham, 24 N. C. (Ired. L.) 204 (1842);
Re Leo Hinson, 156 N. C. 250 (1911);
State vs. Hatley, 110 N. C. 522 (1892);
State vs. Bennett, 4 Devereux & Battle's Law 43 (1838);
State vs. Everitt, 164 N. C. 399 (1913);
State vs. Tripp, 168 N. C. 150 (1914).
State vs. Johnson, N. C. (1915); 84 S. E. 767.

North Dakota.

The subject seems to be regulated by statute, but the courts hold that independent of the statute the courts are without power to suspend execution of sentences.

In re Markuson, 5 N. Dak. 180 (1895);
Re Martha A. Hart, 29 N. Dak. 38 (1914).

Ohio.

Although the power to suspend execution of sentences was questioned in the *Drake* case, it was approved in the *Weber* case.

Weber vs. State, 58 O. S. 616 (1898);
Sterling vs. Drake, 29 O. S. 457, 462 (1876);
Bird vs. Cincinnati, 12 W. L. B. 101 (1884);
In re Clara Lee, 3 N. P. n. s. 533 (1905);
Schaefer vs. State, 7 C. C. Rep. n. s. 292 (1905).

Oklahoma.

While sentence need not be passed at the term at which verdict is rendered or plea made, it is held that sentence begins to run on the day it is passed and cannot be suspended by the courts.

Ex parte Clendenning, 22 Okla. 108 (1908);
Ex parte Sparks, Okla. Cr. App. (1913); 132 Pac. 1118.

Pennsylvania.

The practice of suspending imposition of sentence prevails in this state.

Commonwealth vs. Dunleavy, 16 Pa. Super. Ct. Rep. 380 (1901);
Commonwealth vs. Nuber, 6 Pa. Super. Ct. Rep. 420 (1898);
Commonwealth vs. Mayloy, 57 Pa. St. 291 (1868).

South Carolina.

The courts have no power to suspend the execution of sentences. Sentences may, of course, be suspended pending application for pardon.

State vs. Chitty, 1 S. C. (Bailey) 379 (1830);
State vs. Frink, 1 Bay 168 (1791);
State vs. Abbott, 87 S. C. 466 (1911).

Tennessee.

The existence of the power at common law is recognized, but it is held not to exist in Tennessee.

Allen vs. State, Martin & Yerger 294 (1827);
Fults vs. State, 2 Sneed, 232 (1854);
Spencer vs. State, 125 Tenn. 64 (1911);
State vs. Dalton, 109 Tenn. 544 (1902);
McCampbell vs. State, 116 Tenn. 98 (1905);
Crane vs. State, 94 Tenn. 98 (1894);
Allen vs. State, 77 Tenn. 651 (1882).

Texas.

The governor's power of pardon is held to be exclusive and a statute authorizing suspension of sentences was held to be unconstitutional.

Snodgrass vs. State, Tex. Crim. Rep. (1912);
150 S. W., 162.

Utah.

The courts do not have power to suspend imposition of sentences, and by delay lose jurisdiction.

People vs. Blackburn, 6 Utah, 347 (1890);
In re Flint, 25 Utah, 338 (1903);
Reese vs. Olsen, 44 Utah, 318 (1914).

Washington.

The common law power is declared by statute.

State vs. Mallahan, 65 Wash. 287 (1911).

West Virginia.

There are no decisions in point, but the question was discussed in one case in which the governor's power to reprieve was involved.

State vs. Hawk, 47 W. Va. 434 (1900).

Wisconsin.

Courts are without power to suspend execution of sentences.

In re Webb, 89 Wis. 354 (1895).

Canada.

I am informed that there is no case in Canada dealing with this matter. The power to suspend sentence is given by Section 1081 of the Criminal Code.

The practice in Canada has been to suspend the imposition of sentence and to put the defendant under bond to appear for sentence either at a definite time or when called on, and that power has been approved by the statute referred to.

An analysis of these decisions might be made, but it would be of little value. They are not all directly in point, but bear upon the question. Some courts hold a suspension of sentence is void and results in a loss of jurisdiction and others hold it is void, but not affecting the enforcibility of the judgment.

Some decisions support the power to suspend the imposition of sentence, but deny the power to suspend execution.

In some cases the decisions are put on the ground that sentence must go into effect immediately, and the defendant is constructively serving his sentence from the time it is passed. The governor's power of pardon is held by some cases to bar a suspension of sentence.

The point seems clear that extraordinary cases will always occur in which the courts will feel compelled to find a remedy and that it is better to recognize this power than to force the courts to find other means of avoiding injustice.

Any one who has read these decisions must be convinced that in many of the cases in which the power was denied the courts were seeking some means of relieving the defendants from punishment.

Ex parte Bugg, 145 S. W. 831 (Mo. App. 1912), is cited by the government as a case denying the power to capriciously stay the execution of sentence.

The court in that case denied the power to suspend either the imposition or the execution of sentence and held that sentence could only be satisfied by compliance with its terms and never by a mere lapse of time. It held that jurisdiction was not lost by lapse of time. Under such conclusions there would seem to be nothing left but to compel execution of sentence. The circumstances of the case, however, made the enforcement of the sentence unjust and inhuman, so the court held that though delay alone could not relieve the defendant from the consequence of the judgment against him, he must be relieved *if the delay had been so great that society could derive no benefit from the enforcement of the judgment.*

I cannot understand how a court lacking power to do justice or to prevent injustice in the first instance can acquire power by delay.

If the effect on society could be considered after long delay, why not upon conviction?

Perhaps some comment should be made on other cases cited and relied on by the government.

Fuller vs. State, 100 Miss. 811, 57 So. 806 (1912) is quoted from at length in the government's brief. That court upheld the power by its decision of January 15, 1912, (reported in 57 So. 6) and denied it by its decision of March 11, 1912. The court, in its second opinion, said:

> "The inherent powers of a court are such as result from the very nature of its organization, and are essential to its existence and protection, and to the due administration of justice. * * * * It cannot be said that power to suspend the execution of a sentence * * * * is essential to the due administration of justice, and consequently it has no such power."

If the function of the court is to administer justice, or to put it in the negative, so far as this case is concerned, to prevent injustice, why is not the power inherent—essential to the performance of its duties?

The power should only be exercised in the cases in which otherwise injustice will be done and in such cases the power is essential to the administration of justice. If courts are courts of justice, the power must be inherent.

What will the Mississippi court hold when it is called upon to decide a case like *Ex parte Bugg, supra?* Will it also hold that it will not enforce execution of a sentence if there has been long delay and society will not benefit?

In re Webb, 89 Wis. 354 (1895), cited by the government, held the order of suspension void, but it ordered the discharge of the defendant because the term of his imprisonment had expired, though he had not been imprisoned and had consented to the suspension.

If a prisoner escaped, that court would no doubt compel him to serve his sentence if retaken (see *In re Crow,* 60 Wis., p. 370; *State vs. Momsen,* 153 Wis., 203), but under the *Webb* case if a defendant is allowed to avoid imprisonment under a suspended sentence entered with his consent he is technically serving his sentence all the time and must be released. On page 45 of the government's brief the claim is made that whether the order of suspension is valid or void, the defendant may be committed and compelled to serve his sentence, but on that point, of course, the government will not use this Wisconsin case.

Spencer vs. State, 125 Tenn. 64, (1911) is cited by the government, but no mention is made of the fact that this decision upholds the common law power, but finds the power should not be further exercised because the reasons for its exercise at common law no longer exist.

No mention is made of the fact that the quotation from Hale in this report is the same as in the New York case which the government criticizes.

The attention of the court is called to another Tennessee case, *Allen vs. State,* Martin & Yerger, 294 (1827), in which it is held that a convicted person has a *right* to a suspension to enable him to seek a pardon. In *Crane vs. State,* 94 Tenn., 98 (1894), this right was limited to cases in which the court was disposed to recommend a pardon.

People vs. Barrett, 202 Ill. 287 (1903) is also cited by the government. It should be noted that in both the *Barrett* and *Allen* cases in Illinois a long time had elapsed between the date of the suspension of sentence and the second arrest. It was held that by allowing the convicted defendants to go the courts lost jurisdiction.

If the government has a right to have sentence promptly imposed and executed, how can the government be deprived of its right against the defendant by a void act of a court?

The attention of the court is called to the case of *People vs. Mueller,* 4 Crim. Law. Mag. 725, 15 Chi. Leg. News, 364. (1883) which sustains the power.

The court will also notice *People vs. Heise,* 257 Ill. 443. 450 (1913) in which a statute authorizing suspended sentences was held valid and not an invasion of the governor's power of pardon.

If the exercise of the power by the courts is an invasion of the governor's pardon power, can a statute constitutionally confer the power? The Texas courts take the view that it cannot be done. See *Snodgrass vs. State,* 150 S. W. 162 (Tex. Crim. Rep. 1912).

Cases from Michigan are quoted and discussed in the government's brief and it is claimed that Michigan is not one of the jurisdictions upholding the power.

The case of *People vs. Felker*, 61 Mich. 110 (1886) might come under the principles of *Ex parte Lange*, 18 Wall. 163 (1873).

It is true that in *People vs. Cummings*, 88 Mich. 249 (1891) a statute creating a parole board was declared unconstitutional, but in *People vs. Stickle*, 156 Mich. 557 (1909), an act authorizing suspended sentences in cases of wife abandonment was held constitutional, and in *People vs. Dudley*, 173 Mich. 389 (1912) a probation act was held to be constitutional. I quote the following from the Stickle case:

> "The power to suspend sentence and the power to grant reprieves and pardons are distinct and different in origin and in nature. It has never been supposed that the power of courts to suspend sentence was other than a judicial function. It has been frequently and constantly exercised by courts of record before and since the adoption of the Constitution. 4 Hawk. P. C. Chap. 51; § 8; 1 Bishop on Criminal Procedure, (2nd Ed.) § 1124; 4 Blackstone's Commentaries, chap. 31, *Commonwealth vs. Dowdican*, 115 Mass. 136; *Weaver vs. People*, 33 Mich. 296; *People vs. Reilly*, 53 Mich. 260; *People ex rel Forsythe vs. Court of Sessions*, 141 N. Y. 288. Assuming the power to be, as it was at common law asserted to be, a power inherent in courts, no new power is conferred upon courts when the legislature in terms authorizes courts to suspend sentence."

United States District Judge Tuttle of Detroit has advised respondent by letter:

> "The practice in this State is to suspend sentence indefinitely. Many of our Circuit Judges suspend sentences from term to term, for a time requiring the party to appear before them and report as to his conduct and then when they are satisfied with his behavior, and his promises for the future, they indefinitely suspend the sentence."

The Assistant Attorney General of Michigan has advised that the power exists and is exercised in Michigan.

Neal vs. State, 104 Ga. 509 (1898) is cited and quoted from in the government's brief, but the court should note that the Georgia cases sustain the power to suspend imposition of sentence though they deny the power to suspend execution. I cannot understand the difference in principle. The same result is intended and accomplished. If the government has the right to have sentence executed, it must have the right to have it imposed.

The government evidently is misinformed as to the law and practice in Ohio. The case of *Weber vs. State*, 58 O. S. 616 (1898) has been consistently followed by the lower courts.

The case of *State vs. Baker*, 3 Ohio N. P. n. s. 622, 624 (1905) referred to by the government on page forty-three of its brief did not involve the question presented here. In that case a person had been convicted and sentenced and then applied for a suspension of sentence and for an order admitting him to bail to enable him to prosecute error proceedings. The Common Pleas Court, considering §§13698 and 13757 of the General Code of Ohio, held it had power to suspend execution of sentence, but no power to admit to bail until after the petition in error was filed. It is submitted that the court failed to properly construe the statutes and overlooked its common law power. The power to suspend temporarily and to admit to bail to give effect to the suspension is nowhere denied and was clearly exercised at common law. That Common Pleas decision resembles somewhat the Indiana decision, *Butler vs. State*, 97 Ind. 373 (1884), which held that the courts had no power to suspend a death sentence pending an appeal. The convict had the right to appeal, but might be executed under the judgment while it was being reviewed. The *Baker* case is not in accord with the common practice in Ohio.

There is no mention in the government's brief of the probation legislation in Ohio to be found in §§ 13706 *et seq.* of the General Code, which provides for suspension of sentences. In actual practice in Ohio, some sentences are sus-

pended under the probation statutes and some by virtue of the common law power of the courts.

The statute in Ohio with respect to the testimony of accomplices throws some light on the situation.

The Constitutions of Ohio, of 1802, 1851 and 1913, have all provided that the governor should have power to grant reprieves and pardons after conviction.

A Code of Criminal Procedure was adopted in Ohio, May 6, 1869, which provided:

> "SEC. 146. When two or more persons shall be indicted together, the court may, at any time before the defendant has gone into his defense, direct any one of the defendants to be discharged, that he may be a witness for the state. An accused party may, also, when there is not sufficient evidence to put him upon his defense, be discharged by the court; or if not discharged by the court, shall be entitled to the immediate verdict of the jury, for the purpose of giving evidence for others accused with him; such order of discharge in either case shall be a bar to another prosecution for the same offense." (66 Ohio Laws, 287).

This act has been in force since its passage and is now to be found in Section 13670 of the General Code.*

If the governor's power of pardon is exclusive, as claimed by the government in this case, it would seem that this act is clearly unconstitutional, although it might be classed as an act of general amnesty and come under the decision in *Brown vs. Walker*, 161 U. S., 591 (1896); which holds that the President's power of pardon does not take from Congress the power to pass acts of general amnesty.

I believe the people of Ohio—at least in Toledo—would be shocked by the execution of a sentence of five years in a case like the one under consideration, and the court will note the names of prominent men in Toledo who have recommended suspension of sentence and pardon in this case. (Respondent's Answer, page 15.)

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*A statute and constitutional provision in substantially the same words is in force in Missouri in which the power now in question is

In considering this question now before the court I claim the benefit of the decisions sustaining the power to suspend the imposition of sentences as well as those upholding the power to suspend execution of sentences. The difference in method cannot affect the power. Hale, Hawkins and Blackstone state that the power may be exercised after as well as before judgment.

See also:

People vs. Goodrich, 149 N. Y. Supp. 406 (1914).

I do not believe it is necessary to quote at length from the authorities. The following, among others, sustain respondent's views:

Commonwealth vs. Dowdican's Bail, 115 Mass 133 (1874);

Gehrmann vs. Osborne, 79 N. J. Eq. 430 (1912);

People ex rel. vs. Court of Sessions, 141 N. Y. 288 (1894);

People vs. Goodrich, 149 N. Y. Supp., 406 (1914);

State vs. Crook, 115 N. C., 760 (1894);

Weber vs. State, 58 O. S., 616 (1898);

Commonwealth vs. Dunleavy, 16 Pa. Super. Ct. Rep., 380 (1901);

State ex rel. vs. Drew, 75 N. H., 402 (1909);

Regina vs. Ryan, 7 Cox Crim. Cas., 109 (1855);

Queen vs. Richardson, 8 Dowling's Prac. Cas., 511 (1840).

There are but few cases in this court and in our Federal courts bearing on the questions involved in this case, and this may be as appropriate a place as any to refer to them.

In *United States vs. Pile,* 130 U. S., 280 (1889), it was held by this court that by an order suspending execution of a judgment a court does not retain jurisdiction to vacate the judgment after the term.

In *Pointer vs. United States,* 151 U. S., 396, 419 (1894), this court declined to pass upon the question involved in this case.

In *Ex parte Wells,* 18 How., 307 (1855), the court discussed the President's power to pardon and reprieve and expressed views which have a rather important bearing on this case. Mr. Justice Wayne said the power should be exercised.

> "* * * particularly when the circumstances of any case disclosed such uncertainties as made it doubtful if there should have been a conviction of the criminal, or when they are such as to show that there might be a mitigation of the punishment without lessening the obligation of vindicatory justice. Without such a power of clemency, to be exercised by some department or functionary of a government, it would be most imperfect and deficient in its political morality, and in that attribute of deity whose judgments are always tempered with mercy."
>
> * * * * *
>
> "At the time of the adoption of the constitution American statesmen were conversant with the laws of England, and familiar with the prerogatives exercised by the crown. Hence, when the words to grant pardons were used in the constitution, they conveyed to the mind the authority as exercised by the English crown, or by its representatives in the colonies. At that time both Englishmen and Americans attached the same meaning to the word pardon. In the convention which framed the constitution, no effort was made to define or change its meaning, although it was limited in cases of impeachment.
>
> "We must then give the word the same meaning as prevailed here and in England at the time it found a place in the constitution. This is in conformity with the principles laid down by this court in *Cathcart vs. Robinson,* 5 Pet., 264, 280; and in Flavell's case, 8 Watts & Sargent, 197; Attorney-General's brief."
>
> "There are also pardons grantable as of common right, without any exercise of the king's discretion; as

where a statute creating an offense, or enacting penalties for its future punishment, holds out a promise of immunity to accomplices to aid in the conviction of their associates. When accomplices do so voluntarily, they have a right absolutely to a pardon, 1 Chit. C. L., 766. Also, when, by the king's proclamation, they are promised immunity on discovering their accomplices and are the means of convicting them. *Rudd's* case, Cowp., 334; 1 Leach, 118. But except in these cases, accomplices, though admitted according to the usual phrase to be 'king's evidence,' have no absolute claim or legal right to a pardon. But they have an equitable claim to a pardon, if upon the trial a full and fair disclosure of the joint guilt of one of them and his associates is made. He cannot plead it in bar of an indictment for such offense, but he may use it to put off the trial, in order to give him time to apply for a pardon. (Rudd's case, Cowp., 331; 1 Leach, 115.)"

Speaking of the President's power to reprieve, as distinguished from his power to pardon, Justice Wayne said:

"A single remark from the power to grant reprieves will illustrate the point. That is not only to be used to delay a judicial sentence when the President shall think the merits of the case, or some cause connected with the offender, may require it, but it extends also to cases *ex necessitate legis*, as where a female after conviction is found to be *enceinte*, or where a convict becomes insane, or is alleged to be so. Though the reprieve in either case produces delay in the execution of a sentence, the means to be used, to determine either of the two just mentioned, are clearly within the President's power to direct; and reprieves in such cases are different in their legal character, and different as to the causes which may induce the exercise of the power to reprieve."

In *United States vs Wilson*, 7 Peters 150, 160 (1833), Chief Justice Marshall had this to say concerning pardons:

"The constitution gives to the president, in general terms, 'the power to grant reprieves and pardons for offenses against the United States.'

As this power had been exercised from time immemorial by the executive of that nation whose lan-

guage is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.

A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court."

In the *Whisky Cases*, 99 U. S., 594 (1879), it was held a promise of immunity to an accomplice could not be pleaded in bar, but could only be used to delay prosecution. The opinion by Justice Clifford goes into the history of this phase of the law, but indicates that courts will not permit injustice to be done even a confessed accomplice.

In *Nobles vs. State of Georgia*, 168 U. S., 398 (1897), the court discusses a suspension of sentence to inquire into the sanity of the convict, and holds he is not entitled to a jury.

The Federal cases bearing directly on the question involved in this case are:

United States vs. Wilson, 46 Fed., 748 (1891);
In re James Allen, unreported; (U. S. Dist. Ct., Dist. of Kan., 1st Div., Pollock, J.);
In re Carl Leopold, unreported; (Dist. Ct., Chaves Co., New Mex. Terr. 1909, Pope, J.);
United States vs. Blaisdell, 3 Benedict, 132 (1869);
United States vs. Gilbert, Fed. Cas. No. 15205 (1873).

In the last case, District Judge Sherman said:

> "The motion for a new trial is therefore overruled, and the defendant sentenced to pay a fine of five hundred dollars, and the costs of this prosecution, and to be imprisoned for six months; but under the advice and concurrence of the post-office department, and under all the circumstances of this case, the execution of the sentence as to imprisonment is indefinitely suspended."

In *United States vs. Blaisdell*, 3 Benedict, 132 (1869), the defendants were convicted of violating the internal revenue law and moved the court to delay judgment on the ground that the government, in consideration of disclosures of frauds, had promised immunity.

Judge Blatchford held he would not delay sentence and defendants must look to the executive to carry out the pledges of protection.

The court then sentenced the defendants under one count and suspended sentence under the other counts until after the execution of that sentence.

In *United States vs. Gibert*, 2 Sumner, 19, Fed. Cas. No. 15204 (1834), Judge Story touched upon the power of common law courts to reprieve.

See:

United States vs. Lambert, 2 Cranch, C. C. 137, Fed. Cas. No. 15554 (1817);
United States vs. Jennegen, 4 Cranch, C. C. 118, Fed. Cas. No. 15474 (1830).

We come now to a general discussion of the reasons for the existence and exercise of this power.

The government insists that the objections to the practice are elementary, but leaving out of consideration the acquiescence of the government in the continued exercise of this power, and the fact that judges of the highest standing dis-

agree with the government, it will be difficult to convince me that a young man like Henahan should go to prison to satisfy society's craving for vengeance—to vindicate the law.

If Henahan had stolen a cent, he would have been guilty, just as guilty, so far as concerns the infraction of the law, as if he had stolen a hundred thousand dollars.

If he was guilty, the minimum sentence was five years in the penitentiary. It is no answer to say that the government would not indict a man who had only stolen a cent. If the law *must* be vindicated, every violation of the law must be prosecuted to a conviction and sentence, and every sentence must be executed. There can be no escape from that obligation by any government or court officials, whether grand juries, marshals, district attorneys, or courts. If the courts are not to be trusted with any discretion, there certainly can be none left in the district attorneys.

If this view of the government is correct, then the exercise by district attorneys of the power to *nolle* indictments must be questionable, for we should be obliged to try the question of guilt in all cases and not let it be disposed of by a *nolle* by a district attorney.

Personally, I do not believe, judges are so powerless to humanize the law in the extraordinary cases.

At this point, let the government say what sentence should have been imposed in this case. There were two distinct offenses charged in the indictment. The penalty was not less than five years imprisonment for each offense. If Henahan should suffer the statutory penalty for each offense, upon what authority could a sentence for but five years be based? How will the government explain the unquestioned power of the court to impose sentences to be executed concurrently and thus practically relieve certain convicts from one or more of the penalties provided by law?

It will, no doubt, be claimed that the common law power was limited to reprieves for definite periods and that the

common law authorities do not justify the existence of the power as exercised by respondent.

It is submitted that if only a limited power existed at common law, our social conditions have so changed as to justify and require the exercise of a broad power, and that by reason of such change our courts have properly expanded or modified the law to fit the new situation.

This claim will, of course, be met with the assertion, that the change of conditions makes it unnecessary to exercise the power.

It is true judgments of conviction may be reviewed, bail is required to be accepted, defendants may be heard by counsel, and may testify and offer testimony of others in defense, and that in many respects our criminal laws are not so harsh and rigid as they were in the time of Hale, Hawkins or Blackstone, but, on the other hand, our people are more enlightened and our views as to punishment are different.

Criminals are not punished in this day that they may suffer, nor that the law may be vindicated, nor that the state may have vengeance, but only for the good of society.

I am not equipped to discuss the *rationale* of punishment and must pass the point with the suggestion that our people would look with horror upon a court of justice that, in the circumstances of this case, would send a young man to the penitentiary for five or ten years and ruin him and his family.

It may be that the certainty of punishment is necessary to restrain possible wrong-doers, but until our penal laws are so framed that the courts can measure punishment to the circumstances of each case and the peculiarities of individuals, the power in question should exist and be exercised to the end that injustice may not be done in the extraordinary cases.

I am informed that in England there are no minimum punishments and the court in which a conviction is had may measure the punishment according to the circumstances.

See:

Kenny—Outlines of Criminal Law, page 485.

There will be no necessity for the exercise of this power when our penal laws provide no minimum penalties.

This is illustrated by the case of *People vs. Blackburn*, 6 Utah, 347 (1890), in which a writ of mandamus was sought to compel a judge to impose a sentence. The court held against the power to suspend sentence but refused the writ prayed for because the statute fixed no minimum penalty, and the judge might impose a nominal penalty.

Some State courts hold that though this power existed at common law, it is inconsistent with our institutions and was never adopted as a part of our law.

This is suggested on page 44 of the government's brief, in the following:

> "Of course it goes without saying that, though in England, where there was no division of the government into branches, the court might act as the representative of the King, they may not in this country discharge functions exclusively confided to the executive branch of the Government."

I submit the power in question was always judicial and was not a delegated regal power.

I have not been able to find anything to indicate that this power was ever delegated by the Kings of England to the judges.

Some time prior to the Conquest the Kings did not claim the prerogative of administering justice, or of being the fountain of justice. There is nothing to show that after they claimed the judicial prerogative, they delegated this power in any commissions to their justices. I think it is more likely this power in some form was exercised by our tribunals even in their crudest form, and that it was never taken away after the power of administering justice was claimed by the Kings.

However this may be, the power seems to have been vested in the courts when we adopted the common law, and, by the use of the word "court," in its common law meaning, in our Constitution and statutes, this power was continued in our courts.

In this connection consideration should be given to the results that will follow if this power be denied.

Our district attorneys may then indict as they please, *nolle* the cases they see fit, and control absolutely the whole prosecution. Our courts may then rule on evidence offered and instruct the juries on the law and keep order in the court rooms, but in case of plea of guilty or conviction, must assess the penalties fixed by statute in all cases. If an outrageous minimum penalty is provided, it must be imposed without regard to circumstances.

The weak-minded must suffer equally with the vicious, and technical guilt may compel the imposition of penalties that will be shocking, and trivial offenses may be followed by cruel and oppressive minimum punishments.

Self-respecting judges might well retire rather than become instruments of oppression and injustice.

On this point I mention the practical difficulty of obtaining a pardon, particularly by those who are unfortunate enough to be poor and ignorant and without influential friends.

Of course, it will be suggested that the remedy is to be sought from Congress, but the court will not overlook the great number who must suffer to attract the attention of Congress, and after notice of the situation has been taken, what statute can be drawn to take care of all the extraordinary cases that will arise? Besides, if this discretion is denied the courts because its exercise invades the prerogative of the executive, how can Congress constitutionally legislate it into the courts?

The power of our courts to prevent injustice has in my opinion become greater rather than less, and I submit it is within the power of a court to suspend the execution of a sentence which, as Chitty says, is inconsistent with humanity or justice.

This power is, it seems, more essential to the administration of justice than it was before we adopted the common law, and conditions are now such as to require the existence of a broad power, whether it existed at common law or not.

Our criminal law is constantly developing.

Sir James Stephen, in the preface to his *History of the Criminal Law of England*, says:

> "It has been a matter of unceasing interest to see how the crude, imperfect definitions of the thirteenth century were gradually moulded into the most complete and comprehensive body of criminal law in the world, and how the clumsy institutions of the thirteenth century gradually grew into a body of courts and a course of procedure which, in an age when everything is changed, have remained substantially unaltered, and are not alleged to require alterations in their main features."

In considering the development of our criminal law, it should be remembered that anciently insanity was not a defense, but a special verdict might be rendered that the offense was committed when insane and the right to a pardon followed.

One charged with homicide could not be acquitted by proving the killing to be accidental or in self-defense. Such a person must be found guilty, but was entitled as of right to a pardon.

It is no greater development of the law to say that, in the few extraordinary cases that occur, the courts have power to indefinitely suspend sentence.

The power of courts to admit to bail after conviction has been amplified and enlarged so that now there is little

question as to the propriety of its exercise, and in this connection it might be noted that there are no inflexible rules controlling the exercise of that power, which is to be used with great caution and only when circumstances make it proper. I have not found any complaint against the capricious exercise of the power to admit to bail, though the circumstances controlling its exercise are in many respects the same as those controlling the exercise of the power to suspend sentence.

The respondent shows in his answer (pages 4 *et seq.*) some facts tending to establish the continuous exercise of this power by our judges. If there has been a continuous exercise of the power, what is the effect? If this practice has been common; if it has developed into a custom; if the custom has been common and continuous, has it not become a part of our law?

Have we lost our power to make law by developing custom?

Lord Bryce, in his essay on Roman and English legislation, says our people may make law directly by observing certain usages till these grow so constant, definite and certain that everybody counts on them, assumes their existence, and feels sure that they will be recognized and enforced.

Again, in the same essay, he says:

> "That theory is that the judges of the Common Law Courts are nothing more and nothing less than the officers who expound and apply the Common Law, a body of usages held to be known to the people and by which the people live, usages which existed, in their rudimentary state, as far back as our knowledge extends, most of which have not been formally embodied in any legislative act, but which have been always recognized as binding. Such customary rules are not law because they are declared to be so by the judges; on the contrary the judges enforce them because already, antecedently to their decision, binding law."

See also *Pollock's note "D" to Maine's Ancient Law.*

"But English judges are bound to give their decisions in conformity with the settled general principles of English law, with any express legislation applicable to the matter in hand, and with the authority of their predecessors and their own former decisions. At the same time they are bound to find a decision for every case, however novel it may be; and that decision will be authority for other like cases in future; therefore it is part of their duty to lay down new rules if required. Perhaps this is really the first and greatest rule of our customary law; that, failing a specific rule already ascertained and fitting the case in hand, the King's judges must find and apply the most reasonable rule they can, so that it be not inconsistent with any established principle. They not only may but must develop the law in every direction except that of contradicting rules which authority has once fixed. Whoever denies this must deny that novel combinations of facts are brought before the courts from time to time, which is a truth vouched by common experience and recognized in the forensic phrase describing such cases as 'of the first impression;' or else he must refuse to accept the principle that the court is bound to find a decision for every case, however novel. It is true that at many times the courts have been over-anxious to avoid the appearance of novelty; and the shifts to which they resorted to avoid it have encumbered the common law with several of the fictions which Maine denounces (p. 27) as almost hopeless obstacles to an orderly distribution of its contents."

See:

Bechuanaland Exploration Co. vs. London Trading Bank, 2 Q. B. (1898) 658.

If the power was not in fact exercised at Common Law to the extent now claimed, what is the result of the common and continuous exercise of the power by our judges?

It seems clear that in States in which courts have common law powers, the development or amplification of the common law may enlarge the powers of a court.

In the case of a court whose common law powers (using the expression for convenience), are only such as are necessarily implied from statute, it would seem that the effect of the continuous exercise of a power in a certain way must result in a construction of the statute admitting the exercise of the power.

Considering further the results, if this power be denied, it seems proper to mention the use made of this power in the past by the Department of Justice, to secure convictions.

It has been used frequently and with great effect in cases of accomplices.

The Department has frequently arranged for the suspension of imposition of sentence against one of two or more co-defendants so as to keep him available as a witness. It has been found that better results have attended this practice than the practice of making bargains between criminals and the department.

It must be borne in mind that the denial of this power will result in hardship upon the poor and ignorant classes of defendants in criminal cases, and upon the very old, very young and the sick.

It seems to me the strongest argument against the exercise of this power is that it will destroy all the elasticity in the execution of our criminal laws.

If this power is to be denied, it must follow that district attorneys must be denied the power to *nolle* indictments.

If the sole function of the court is to determine the fact of guilt, a district attorney cannot be allowed to usurp that function by entering a *nolle* in any case which he thinks cannot be successfully prosecuted or which he thinks does not justify punishment.

If the government has the right to have the guilty punished, it has the right to have the accused tried, lest some guilty ones escape.

In this connection, also, where do Federal courts obtain the power to permit a *nolle* to be entered? There is no Federal statute on the subject yet the exercise of the power is not open to question.

2. This Power is One of the Implied Powers of our Federal Courts.

The judicial powers of the Federal district courts and of the judges thereof must, of course, be traced to acts of Congress passed pursuant to the Constitution and are such as are expressly granted or conferred by necessary implication.

It is submitted that the word "courts" in the Constitution and statutes was used in its common-law meaning, and, if courts at common law had this power, then, it follows that our Federal courts have it unless an intention to exclude it clearly appears.

This view seems to be consistent with §722 R. S.

The government insists that statutes of the United States exclude the power, claiming they are suitable to accomplish the prosecution and punishment, but the common-law power in question goes to both the punishment and the power to determine when the law applies.

In Ohio an act for the relief of persons imprisoned for failure to pay fines was held to be constitutional on the ground that it was a modification of penalties rather than an exercise of the pardoning power.

Ex parte Scott, 19 O. S., 581 (1869).

It is submitted that by reason of the common law (perhaps as modified) an exception is provided to all our statutes imposing penalties for crimes, and our courts, by necessary implication, are authorized to determine what cases come within the exception.

It may not be an inherent power, that is, it may be possible to organize courts and compel them to adhere to statutory penalties, but, being one of the powers making up a common-law court, it became by necessary implication one of the powers of our Federal district courts.

See:

Howard vs. United States, 75 Fed., 986, 990 (1896);
In re Henry, 123 U. S., 372 (1887).

Our Federal courts frequently impose sentences to run concurrently, in fact where two or more sentences are imposed at the same time, they run concurrently and not cumulatively, unless there is a clear direction that they shall be cumulative.

See:

United States vs. Patterson, 29 Fed., 775 (1887);
Kirkman vs. McClaughry, 152 Fed., 255 (1907);
Ex parte Peake, 144 Fed., 1016 (1906).

The government denies the power in this case on the ground that the statutes are suitable for the punishment of convicts and the power in question works toward the avoidance of punishment.

If the letter of the statutes must be followed, a penalty must be suffered for each offense and, to be consistent, the government must deny the propriety of concurrent sentences.

Henahan committed two distinct offenses, the penalty for each being five years' imprisonment. If the statutes are to be strictly followed, his sentence should have been ten years' imprisonment.

It is submitted that in the absence of a statute clearly denying the power, our Federal courts have the common-law power to suspend execution of sentences.

The courts claim the power to impose concurrent or cumulative sentences because courts at common law had that power. If that is the reason, then why may not courts also exercise the common law power of suspending sentences? If the power to impose concurrent sentences is one of the implied powers of Federal courts, implied because the power was exercised at common law, then why is not the common law power in question to be implied?

It might be noted at this point that §31 of the Act of April 30, 1790, reads:

> "And be it further enacted that the benefit of clergy shall not be used or allowed, upon conviction of any crime, for which by any statute of the United States, the punishment is, or shall be declared to be, death."

It would seem that §31 was adopted for the reason that in its absence the common law power of allowing benefit of clergy would exist and might be exercised.

It appears that in the District of Columbia in 1817, benefit of clergy was allowed.

In *United States vs. Lambert*, 2 Cranch C. C., 137, Fed. Cases No. 15,554 (1817) the following appears:

> "Verdict, guilty—recommended to mercy by the jury. The court decided that he was entitled to the benefit of clergy and sentenced him to be burnt in the hand, and to recognize in 500 dollars for his good behavior for one year, and to stand committed till the costs should be paid."

The court must have understood it had the right to exercise some common law powers.

Quaere. Does the repeal of the Act of April 30, 1790, by the Act of March 4, 1909, have the effect of restoring the plea for benefit of clergy?

In the absence of an Act of Congress, the courts of the United States are governed by the rules of the common law in the administration of the criminal law.

See:

Howard vs. United States, 75 Fed., 986, 990 (1896);
United States vs. Nye, 4 Fed., 888 (1880);
Erwin vs. United States, 37 Fed., 470, 488 (1889);
United States vs. Maxwell, 3 Dill., 275, 278 (1875).

If the courts may look to the common law for their power to impose cumulative sentences, or sentences which run concurrently, or sentences which commence in the future, or to permit cases to be disposed of by *nolle*, why may not the same common law give the power to suspend sentence in the few extraordinary cases in which injustice would otherwise result?

3. By the Continuous Exercise of the Power, the Statutes Creating and Defining the Powers of Our Federal Courts and Those Prescribing Penalties for Crimes Have Been Construed in Practice to Admit the Exercise of This Power.

The statutes creating our district courts and those fixing the penalties for crimes have been construed in the practice of the last century or so to admit the existence and exercise of the power to suspend sentences indefinitely. As shown in respondent's answer, many judges of the highest standing have exercised the power and, of course, the Department of Justice has been cognizant of the practice.

Is it not too late to complain, and must not the government seek the aid of Congress if the practice is not satisfactory?

It may be that in practice there has been a development, expansion or amplification of the common law—that the common-law power has been extended from the power to grant

temporary or definite reprieves to the power to indefinitely suspend sentences in one form or another, but I know of no reason why the construction of statutes may not be modified by practice. If practice can fasten a construction upon statutes, it can certainly modify that construction.

It is not admitted that there has been any change in the common law or in the practice of the courts or in the construction given to the statutes creating our inferior Federal courts or fixing penalties for crimes, but it is submitted that the exercise of the power as claimed by respondent is justified by practice, even though the power did not exist at common law.

This court has sustained judicial powers in several instances because of settled practice.

In *Stuart vs. Laird*, 1 Cranch, 299, (1803), the court upheld the right of a justice of the Supreme Court to sit as a circuit judge. The court said:

> "Another reason for reversal is, that the judges of the supreme court have no right to sit as circuit judges, not being appointed as such, or in other words, that they ought to have distinct commissions for that purpose. To this objection, which is of recent date, it is sufficient to observe that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed."

In *McKeen vs. Delancy's Lessee*, 5 Cranch, 22 (1809) this court upheld the practice of acknowledging deeds before a justice of the Supreme Court of Pennsylvania, though the statute required acknowledgment before a justice of the peace. Chief Justice Marshall said that if the act was under

construction for the first time, it would be obliged to hold a justice of the Supreme Court could not be deemed a justice of the peace, and he then continued:

> "But, in construing the statutes of a State, on which land titles depend, infinite mischief would ensue, should this court observe a different rule from that which has been long established in the State; and in this case, the court cannot doubt that the courts of Pennsylvania consider a justice of the Supreme Court as within the description of the act.
>
> "It is of some weight that this deed was acknowledged by the chief justice, who certainly must have been acquainted with the construction given to the act, and that the acknowledgment was taken before another judge of the supreme court."

In *Martin vs. Hunter's Lessee*, 1 Wheat., 304, 352 (1816), the appellate power of this court was in question. This court said:

> "This weight of contemporaneous exposition by all parties, this acquiescence of enlightened state courts, and these judicial decisions of the supreme court through so long a period, do, as we think, place the doctrine upon a foundation of authority which cannot be shaken, without delivering over the subject to perpetual and irremediable doubts."

In *Cohens vs. Virginia*, 6 Wheat, 264, 420 (1821), this court said:

> "While on this part of the argument, it may be also material to observe that the uniform decisions of this court on the point now under consideration, have been assented to, with a single exception, by the courts of every State in the Union whose judgments have been revised. It has been the unwelcome duty of this tribunal to reverse the judgments of many state courts in cases in which the strongest state feelings were engaged. Judges, whose talents and character would grace any bench, to whom a disposition to submit to jurisdiction that is usurped, or to surrender their legitimate powers, will certainly not be imputed, have

yielded without hesitation to the authority by which their judgments were reversed, while they, perhaps, disapproved the judgment of reversal.

"This concurrence of statesmen, of legislators, and of judges, in the same construction of the constitution, may justly inspire some confidence in that construction."

In *Tayloe vs. Thomson's Lessee*, 5 Peters, 358, 368 (1831), this court held that an act which by its terms applied only to British merchants, had been construed in practice to apply to all judgment creditors. This court said:

> "It is enough for this court to know, that by ancient, well established, and uniform usage, it has been acted on and considered as extending to all judgments in favour of any persons; and that sales under them have always been held and respected as valid titles. The circuit court were right in deciding that the plaintiff below was entitled to all the benefits of the statute of 5 Geo. II. Though it does not provide a judgment shall be a lien from the time of its rendition; yet there is abundant evidence that it has always been so considered, and so acted on."

In *New Jersey Steam Navigation Co. vs. Merchants' Bank*, 6 How., 344, 385 (1848), this court sustained the jurisdiction of Federal courts in admiralty by a practical construction of the Judiciary Act.

See also:

Fairbank vs. United States, 181 U. S., 283, 307 (1901);

The Laura, 114 U. S., 411 (1885);

Bank of United States vs. Halstead, 10 Wheat., 51, 62 (1825);

Atkins vs. Fiber Disintegrating Co., 18 Wall., 272 (1873).

The government claims that Congress has not recognized this power, but it is submitted that Congress must have known of the practice and must have acquiesced in the practical con-

struction thereby fixed upon the statutes creating and defining the jurisdiction of Federal courts. I find two instances in which the practice must have been directly before Congress.

In the second session of the Sixty-Third Congress a bill was introduced in the House to codify, revise, and amend the laws relating to the judiciary (H. R. 15578) which provided in §269 that a person sentenced to imprisonment, either in a jail or penitentiary, should be ordered by the court into the custody of the marshal. The bill was amended in the House of Representatives and appeared in the Senate reading thus:

> "A person sentenced to imprisonment either in a jail or penitentiary, unless the execution of the sentence be suspended, shall be ordered by the court into the custody of the marshal."

The bill was not passed, but it is entitled to some consideration as a recognition of the practice by Congress.

Attention is also called to Chap. 50, §2, of the Act of February, 13, 1913, relating to larcency of goods in inter-state commerce, which provides:

> "That nothing in this Act shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof; and a judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution hereunder for the same act or acts."

Does this Act recognize the State practice? Suppose Henahan had been convicted in the State courts of New York for larcency of goods in inter-state commerce and imposition of sentence had been suspended; or suppose the conviction had been in Ohio and execution of sentence had been suspended; could the government force the punishment of the offender by a prosecution under the Act of February 13, 1913?

It is submitted, then, that our Federal courts have and may exercise this power because it existed at common law and was added to their statutory powers by necessary implication, and it is also claimed that by reason of the practical con-

struction given to our statutes, our courts have the right to exercise the power now drawn in question.

4. The Exercise of This Power is Not an Invasion of the Pardoning Power.*

Is a suspended sentence the equivalent of a pardon, since it does not relieve the convict from the civil disabilities resulting from conviction?

The claim of the government is that under our scheme of government the pardoning power, which includes reprieve and commutation, is an exclusive function of the executive branch, not to be enjoyed by the judiciary.

I take it that if the courts exercised this power at common law, the result was necessarily a limitation of the King's power to pardon or reprieve, that is, the King's power in this respect was not exclusive.

In *Ex parte Wells*, 18 How., 307 (1855), Mr. Justice Wayne said:

> "At the time of the adoption of the constitution American statesmen were conversant with the laws of England, and familiar with the prerogatives exercised by the crown. Hence, when the words to grant pardons were used in the constitution, they conveyed to the mind the authority as exercised by the English crown, or by its representatives in the colonies. At that time both Englishmen and Americans attached the same meaning to the word pardon. In the convention which framed the constitution, no effort was made to define or change its meaning, although it was limited in cases of impeachment.
>
> "We must then give the word the same meaning as prevailed here and in England at the time it found a place in the constitution."

See also:

> United States vs. Wilson, 7 Peters, 150, 160 (1833).

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* The attention of the court is called to an article entitled, **"Executive, Legislative and Judiciary in Pardon,"** by Prof. James D. Barnett of the University of Oregon, in Vol. XLIX, American Law Review, page 684, particularly pages 705 et seq.

The civil disabilities of a convict are not removed by a suspension of execution of sentence and in this respect it differs from a pardon.

In *People ex rel. vs. Court of Sessions*, 141 N. Y., 288 (1894), the New York Court of Appeals said:

> "The power to suspend sentence and the power to grant reprieves and pardons, as understood when the Constitution was adopted, are totally distinct and different in their origin and nature. The former was always a part of the judicial power. The latter was always a part of the executive power. The suspension of the sentence simply postpones the judgment of the court temporarily or indefinitely, but the conviction and liability following it, and all civil disabilities, remain and become operative when judgment is rendered. A pardon reaches both the punishment prescribed for the offense and the guilt of the offender."

In *People vs. Stickle*, 156 Mich., 557 (1909), the Supreme Court of Michigan quotes with approval from the New York decision, and says:

> "A question presented in argument, one not raised in the court below, relates to the effect to be given to the proviso to section one. The point is considered for the reason heretofore given. The pardoning power belongs to the executive. If the effect of the proviso is to distribute any part of the pardoning power to another department of government, the legislation is invalid. If it is invalid, we shall be obliged to determine whether the act without the proviso may be sustained. The power to suspend sentence and the power to grant reprieves and pardons are distinct and different in origin and in nature. It has never been supposed that the power of courts to suspend sentence was other than a judicial function. It has been frequently and constantly exercised by courts of record before and since the adoption of the Constitution, 4 Hawk. P. C. chap. 51, §8; 1 Bishop on Criminal Procedure (2d. Ed.) §1124; 4 Blackstone's Commentaries, chap. 31; *Commonwealth vs. Dowdican*, 115 Mass., 136; *Weaver vs. People*, 33 Mich., 296; *People vs. Reilly*, 53 Mich 260; *People ex rel. Forsyth vs. Court of Sessions*, 141 N.

Y., 288. Assuming the power to be, as it was at common law asserted to be, a power inherent in courts, no new power is conferred upon courts when the legislature in terms authorizes courts to suspend sentence. The distinction between the pardoning power and the power to suspend sentence is clearly pointed out in the opinion in *People ex rel. Forsyth vs. Court of Sessions, supra.*"

See:

Spencer vs. State, 125 Tenn., 64, at p. 69 (1911);

State vs. Addy, 43 N. J. L., 113 (1881).

It has been held that the President's power of pardon does not deprive Congress of power to pass acts of general amnesty.

Brown vs. Walker, 161 U. S., 591 (1896).

In this connection, it is proper to call the attention of the court to the conflict of authority as to the constitutionality of statutes authorizing the suspension of sentences. The courts of New York, Michigan, Illinois, Washington, Missouri, California and New Mexico, sustain the statutes, while the decisions in North Dakota and Texas are adverse.

See:

People vs. Heise, 257 Ill., 443, 450 (1913);

People ex rel. vs. Court of Sessions, 141 N. Y., 288 (1894);

People vs. Stickle, 156 Mich., 557 (1909);

Re Martha A. Hart, 29 N. Dak., 38 (1914);

Snodgrass vs. State, Tex. Crim. Rep. (1912), 150 S. W., 162;

Commonwealth vs. Halloway, 42 Pa. St., 446 (1862);

Ex parte Bates, N. Mex. (1915), 151 Pac. 698;

Ex parte Parker, 106 Mo. 551 (1897);

State vs. Mallahan, 65 Wash. 287 (1911);

In re Giannini, 18 Cal. App. 166 (1912).

The government declines to concede the constitutionality of such legislation (Brief, pages 9, 10), but it seems clear that such legislation, as well as §§ 1042 and 5296 R. S. relating to remission of fines, comes within the decision of this court in *Brown vs. Walker, supra,* and does not invade the President's power of pardon.

It would seem that both the power of the executive to pardon and the judicial power to suspend sentences are directed to the same end, and since they have both been in existence for centuries and the courts and executives have seldom been in conflict in their exercise, there is no reason to anticipate any danger from continuing both powers.

There is but one case in the books in which it appears than an executive objected to the exercise of this power by the courts and that was a reprieve of execution of a death sentence for only twenty days. Miller's case, 9 Cowen, 730 (1828).

I submit the two are not inconsistent; that they are not equivalents and the power of the executive is not exclusive.

I think there can be no doubt that the courts have exercised this power for a long time with the acquiescence of the Presidents.

Of course, the Department of Justice has known of the practice through the district attorneys and clerks and, in fact, the Department has requested courts to suspend sentences. In two cases before Judge Swan at Detroit, the record shows:

> "On motion of the District Attorney, Attorney General approving, sentence suspended indefinitely."
>
> United States vs. Fields, No. 5069, February 28, 1909;
>
> United States vs. Forsythe, No. 5071, Feb. 28, 1909.

It might be noted those were cases of embezzlement, taking money order funds and letters from the post office under §§4046 and 5069, R. S.

It may be that in those cases there were mitigating circumstances as in this case, and restitution having been made, the government did not feel that the safety of society required punishment.

In *United States vs. Phillips*, 6 Peters, 776 (1832), it appears that after the case was in this court a *nolle* was entered by the Attorney General by the direction of the President.

The government in the past has recommended and obtained suspended sentences in order to benefit by the assistance and testimony of accomplices.

If this is a correct statement of the practice, has it not been determined in actual practice that one power does not conflict with the other?

The case of *The Laura*, 114 U. S., 411 (1885), seems to be exactly in point. The head note prepared by Mr. Justice Harlan, reads:

> "The practice of granting remissions of pecuniary penalties and forfeitures, by officers other than the President, sanctioned by statute and acquiescence for nearly a century, as a valid exercise of authority, and no invasion of the power of pardon granted by the Constitution to the President, is too firmly established to be questioned."

In that case fines were remitted by the Secretary of the Treasury and it was claimed this was an invasion of the power of the President.

The court said:

> "The warrant of remission, it is contended by the libelant, is without legal effect, and should have been disregarded, because the statute upon which it rests is in conflict with the clause of the Constitution investing the President with power 'to grant reprieves and pardons for all offenses against the United States, except in cases of impeachment.' The argument advanced in support of this position, briefly stated, is: That the power of the President to grant pardons includes the power to remit fines, penalties and forfeitures imposed for the commission of offenses against, or for the vio-

lation of the laws of, the United States; that such power is in its nature exclusive; and that its exercise, in whatever form, by any subordinate officer of the government, is an encroachment upon the constitutional prerogative of the President.

"It is not necessary to question the soundness of some of these propositions. It may be conceded that, except in cases of impeachment and where fines are imposed by a coordinate department of the government for contempt of its authority, the President, under the general unqualified grant of power to pardon offenses against the United States, may remit fines, penalties, and forfeitures of every description arising under the laws of Congress; and, equally, that his constitutional power in these respects cannot be interrupted, abridged or limited by any legislative enactment. But is that power exclusive, in the sense that no other officer can remit forfeitures or penalties incurred for the violation of the laws of the United States? This question cannot be answered in the affirmative without adjudging that the practice in reference to remissions by the Secretary of the Treasury and other officers, which has been observed and acquiesced in for nearly a century, is forbidden by the Constitution. That practice commenced very shortly after the adoption of that instrument, and was, perhaps, suggested by legislation in England, which, without interfering with, abridging, or restricting the power of pardon belonging to the Crown, invested certain subordinate officers with authority to remit penalties and forfeitures arising from violations of the revenue and customs laws of that country. Stat. 27 George III., chap. 32. See also Stat. 51, George III., chap 96, and 54 George III., chap. 171."

See also:

Stuart vs. Laird, 1 Cranch, 299 (1803);

McKeen vs. Delancy's Lessee, 5 Cranch, 22 (1809);

People vs. Goodrich, 149 N. Y. Sup., 406, 411 (1914).

I submit that the long continued exercise of this power by our courts is one of the most important elements of this case and strongly supports the conclusion that the power exists and is properly exercised.

5. The Courts May Retain Jurisdiction After the Close of Terms of Court for the Purpose of Completing the Exercise of this Power.

The order entered in the case under review directed the term to be kept open for five years. I do not think this was necessary. If the power exists, it cannot be cut off by the close of the term. The situation is exactly the same as continuing jurisdiction in any undisposed of case.

I prefer to dispose of this question without discussing the authorities bearing upon terms of courts, by adopting the language used in 1561 by the Justices in 2 Dyer 205 a.

> "And yet by the opinion of all the Justices the order of further respite is good enough; and the custom of the realm has always been so."

6. The Defendant May Have a RIGHT to a Suspension of Sentence in Some Circumstances.

To what extent is a citizen of the United States entitled as a matter of right, to a suspension of a sentence against him, to enable him to apply to the President for a pardon?

In *Ex parte Wells*, 18 How., 307 (1855), Mr. Justice Wayne said the President's power of pardon was to be exercised:

> "* * * * * particularly when the circumstances of any case disclosed such uncertainties as made it doubtful if there should have been a conviction of the criminal, or when they are such as to show that there might be a mitigation of the punishment without lessening the obligation of vindicatory justice. Without such a power of clemency, to be exercised by some department or functionary of a government, it would

be most imperfect and deficient in its political morality, and in that attribute of deity whose judgments are always tempered with mercy."

If the President owes this duty to the unfortunates who may have occasion to ask his clemency, it seems they must have a corresponding right to a hearing and to fair and impartial consideration.

There have been cases in which it was claimed citizens were denied a right to this consideration by reason of the fact that the executive was prejudiced.

Of course, there are no authorities to be cited on this point. Any citizen has a right to a fair and impartial hearing of his application for a pardon, and, if so, reasonable means must be afforded to exercise the right and to obtain a hearing.

Is it not within the power of a court and is it not its duty to suspend a sentence until a pardon has been refused, in a case in which the court believes a pardon should be granted?

Assuming that courts do not have the power to suspend sentences indefinitely, may they not suspend sentences until the executive refuses to pardon?

If a court believes punishment would be unjust, or that a pardon should be granted, may it not suspend sentences until a pardon has been refused?

In *Allen vs. State*, Martin & Yerger, 294 (1827), the Supreme Court of Tennessee held a convicted person had a right to a suspension of sentence to enable him to apply for a pardon. The court said:

> "The remaining ground for the success of this application to the Court is the Constitution. By it 'the Governor shall have power to grant reprieves and pardons after conviction, except in cases of impeachment.' Here the power to grant a reprieve or pardon is unquestionably given to the Governor. But this power would be given in vain, unless an opportunity was given for its exercise by him. The means of exercising the power must also then come within the Constitution, and be a constitutional right. The means,

therefore, must be a right in the convicted citizen to be afforded by this Court, in those cases where the final judgment, after conviction, is rendered thereupon. This right must, of necessity, supersede the immediate execution of the judgment, or the carrying the same into effect, as far as is reasonably necessary, under the circumstances, for its exercise, or the making the application to the governor.

"It is asked from this Court, by the plaintiff in error, as the means of enabling him in the present case to exercise his constitutional right to suspend, until the next term of this Court, the execution of the judgment, and in the meantime, to admit him to bail.

* * * * *

"This Court have little doubt but that in cases of manslaughter, the execution of the judgment ought to be suspended, for the burning in the hand is the most important part solicited as the object of pardon, which, if inflicted, the benefit of the privilege would be much impaired."

In *Crane vs. State*, 94 Tenn. 98 (1894) this was qualified and it was held a suspension should not be granted unless in the opinion of the court a pardon is merited.

The South Carolina courts hold that there should be a suspension of execution of sentence to allow an application to be made for a pardon whenever the law inflicts, upon conviction, a specific and infamous punishment, or where, but for a suspension, the convict would irretrievably lose some legal right.

See:

State vs. Chitty, 1 S. C. (Bailey) 379 (1830);
State vs. Abbott, 87 S. C. 466 (1911).

In the case now under consideration the minimum penalty for each offence was five years' imprisonment and the statute gave no discretion to the court. It must be five years or nothing. The defendant may have stolen a cent or a million and may have been weak-minded or not, the penalty was five years.

In such a case, I submit a court may pass the responsibility to the executive and let him say whether the penalty shall be enforced or not.

It will not do to allow the convict until the next term of court, or any definite time, to obtain his pardon. He may or may not be able to be heard in the time fixed.

The responsibility should lie on some one other than the court and it may properly leave it to the executive to hasten or delay the result.

A court should not assume the burden of imposing cruel and oppressive penalties. A court should never voluntarily permit injustice to be accomplished.

In proper circumstances, I submit a court may and should suspend its judgment until the executive has taken the responsibility by either allowing or refusing a pardon.

In *People vs. Mueller*, 4 Crim. Law. Mag. 725, 15 Chi. Leg. News, 364, (1883) Judge Barnum said:

> "The power of the court to suspend was neither discussed or denied. It becomes my duty, none the less, to pass upon it as an alternative to entering a judgment which would consign an innocent man to the penitentiary. It is true the governor might pardon the prisoner after sentence, but who shall pardon the court for the iniquity of a judgment of guilty upon a man not guilty. Pardons are for the guilty; the innocent are entitled to justice rather than mercy."

7. What Facts Should Be Shown or Appear to Make it Proper for the Court to Exercise the Power to Suspend a Sentence?

The right to suspend temporarily for many purposes is conceded, so the question is when may or should a court suspend a sentence indefinitely?

The power to suspend sentence capriciously or arbitrarily is not claimed, and so far as is known no judge ever claimed or exercised that power.

The power claimed is the power to suspend sentence indefinitely in cases in which the imposition or execution of sentences would result in injustice.

It is not claimed that the power may be exercised for the purpose of terrorizing a convict or keeping him subject to the caprice of the judge.

A convicted person, subject to the penalties fixed by law, may insist on receiving and executing his sentence, and sentences should never be suspended indefinitely over the objection of a defendant.

The claim is made by the government that it also has a right to have judgment entered and executed, but it is submitted that all penal laws are subject to the exercise of this power by the courts, and when injustice will result, the penalties of the law may be suspended.

The rights of the defendant and the government in this respect are considered in *Gehrmann vs. Osborne, supra.* Vice Chancellor Garrison said:

> "The two points of view from which the matter must be considered are, of course, that of the state or public on one hand and that of the defendant on the other. Since the measure of the punishment to be inflicted in any given case (excepting some few of which murder in the first degree is a conspicuous example) is left entirely at the discretion of the court, it would seem that, from the public point of view, it must be held that the public rights are presumably protected by whatever the judge in his discretion does in this respect. It is for him to determine whether the defendant shall pay a fine within the limits fixed by the statute, or suffer some imprisonment, within limits similarly fixed. And it can well be argued from the standpoint of public policy that it is proper for the court, in those cases where it finds that the public interests will best be served by not presently imposing any sentence to thus deal with the subject.
>
> "Considerations of public policy may often properly induce a court to hold off inflicting punishment for such a time as that course seems discreet to the court.

The power would seem to be analogous to the immunity that courts in their discretion, may give an accomplice to aid the prosecution. (*State vs. Graham*, 41 N. J. Law, 15, (Sup. Ct. 1879) 32 Am. Rep. 174), and is similarly exercised where one equally guilty has pleaded guilty, or *non vult*, and has aided the state in the trial of the others concerned in the commission of the crime."

As to the necessity of obtaining the defendant's expressed or implied consent to the suspension Vice Chancellor Garrison said:

"From the defendant's standpoint, the only legitimate objection, it would seem to me, to the action of the court in refraining from presently inflicting punishment, would be the undesirability of remaining in the indeterminate position resulting from a suspension of the pronouncement of judgment. But is not this essentially a matter within his own control? Undoubtedly any convicted defendant could compel the proper court, by *mandamus*, to pronounce judgment; and, in my view, if a court sought to postpone the sentencing, or suspend it, for any purpose or any period which would be clearly unreasonable, the defendant could fully protect his rights by objection which would, undoubtedly, in my view, result either in the trial court not attempting to exercise the jurisdiction in the face of objection, or in the supreme court holding that, in the face of an objection, the trial court acted improperly in unreasonably delaying the pronouncement of judgment and subsequently pronouncing one.

"As a general principle, I should say, that, either the successful or the defeated party in any litigated proceeding, civil or criminal, could move for judgment at any time when and after the matter was ripe for judgment.

"But if the defendant acquiesces, or does not object, it is difficult to see how he can be said to be injured. It is necessary to remember that the defendant has been convicted; that the court has the power to inflict the full measure of punishment; that if a defendant, thus in peril of suffering the full penalty of the law, is not visited with it, many things may hap-

pen favorable to him; while nothing worse than his present plight can possibly happen. If a defendant thus circumstanced sees fit not to object, or to acquiesce, I do not see who else is concerned that can complain, nor how he can legitimately complain.

"I feel quite sure that, under the criminal law as administered in this state, where every right of the defendant is zealously guarded, and the state is held to have power to inflict punishment only when every step has been taken in exact accordance with legal procedure, there is no danger that a defendant will have any right violated, or be in any way oppressed, if the custom so long in vogue is continued.

"I am inclined to say,—although, of course, not to find, because it is not in issue,—that the power thus to indefinitely suspend sentencing, which exists in the court, is not exercisable in the face of an objection by the defendant; that when exercised in default of objection, and with either implied or actual acquiescence, it is a lawful exercise of power residing in the court, and cannot result in the release of a prisoner subsequently sentenced, and who applies by a writ of *habeas corpus* for that purpose."

In *State vs. Hilton*, 151 N. C. 687, 692 (1909) the Supreme Court of North Carolina says:

"And in the more recent applications of the principle the better-considered decisions are to the effect that the power indicated should only be upheld when sanctioned by usage, and where the consent of the defendant was expressly given or would be implied from the fact that its evident purpose was to save defendant from a more grievous penalty permitted or required by the law."

See also:

Marks vs. Wentworth, 199 Mass. 44 (1908).

It is not claimed that a suspended sentence may be forced upon a convict as a commutation of sentence or conditional pardon may in some cases.

See as to conditional pardon without the consent of the convict:

Ex parte Wells, 18 How. 307, 315 (1855).

I do not concede that the court is without power, unless the defendant consents, but rather put it that in ordinary circumstances the court will not exercise the power without the consent, express or implied, of the defendant.

An objection made by some courts to a suspension of sentence is that it leaves the defendant in an uncertain position, in that he cannot tell for an indefinite period whether he is a free man or a convict, and while the sentence may be for a definite time, he may be subject to the suspended sentence for a much longer period.

These courts overlook the fact that the defendant may have immediate and certain punishment if he insists.

There is a suggestion in some of the cases that the suspension should not continue beyond the term of the sentence and some statutes have fixed the term of suspension at double the term of sentence.

See:

Harris vs. Nixon, 27 App. D. C. 94 (1906).

It is submitted that the suspension is limited only by the same rules that make the exercise of the power to suspend proper, that is, the order of suspension may not be vacated and sentence imposed or ordered executed when that course would be unjust.

The North Carolina court in *State vs. Hilton, supra,* says that no well considered decision will uphold the principle that sentence may be pronounced after an indefinite suspension of judgment when every condition attached has been complied with.

See:

State vs. Addy, 43 N. J. L. 113 (1881).

The Missouri Appeals case of *Ex parte Bugg, supra,* though denying the power, holds that sentence cannot be enforced after long delay when society would derive no good from its enforcement.

No fixed or inflexible rules governing the exercise of this power can or should be laid down. The rule was created, I believe, to provide for the unusual and extraordinary cases in which the strict enforcement of the law would be unjust, and this purpose might be defeated if the exercise of the power was too rigidly controlled. For the same reason, I believe the exercise of this power by the courts, without fixed rules, will be of greater benefit to society than the exercise of the power under statute.

The following from Maine's Ancient Law, page 367, is not inappropriate:

> "It is always easy to say that a man is guilty of manslaughter, larceny, or bigamy, but it is often most difficult to pronounce what extent of moral guilt he has incurred, and consequently what measure of punishment he has deserved. There is hardly any perplexity in casuistry, or in the analysis of motive, which we may not be called upon to confront, if we attempt to settle such a point with precision; and accordingly the law of our day shows an increasing tendency to abstain as much as possible from laying down positive rules on the subject."

This tendency mentioned by Maine is shown by the English laws, which fix no minimum punishments.

The view taken by respondent that the practice of suspending punishments avoids improper acquittals (Answer, page 3) is supported by the results following the English laws omitting minimum penalties. (See Kenny—Outlines of Criminal Law, page 485.)

The exercise of this power should be left to the discretion of our judges with perhaps the caution that it applies only to extraordinary cases in which great injustice will result from the strict enforcement of the letter of the law.

Judge O'Brien in the New York case said:

> "It is a power which the court should possess in furtherance of justice, to be used wisely and discreetly, and it is perhaps creditable to the administration of justice in such cases that the power has always existed, no complaint has been heard of its abuse."

In *State vs. Crook*, 115 N. C. 760 (1894), the Supreme Court of North Carolina said:

> "The exercise of this discretionary power has not heretofore been questioned, and the beneficial effects of its judicious use have been made so manifest as to commend it both to the Judges and the people."

The courts exercise a similar discretion in allowing bail, particularly after conviction.

It appears in *1 Journal of Criminal Law*, 438, that a committee of the American Institute of Criminal Law and Criminology concluded a report thus:

> "We approve of the suspension of sentences to imprisonment when coupled with like suspension and limitations, (i. e.) when coupled with thorough supervision by competent officers and when applied consistently with public safety to those cases in which there is a reasonable prospect of reform."

The fact that this power has been freely exercised by our judges in one form or another without complaint of its abuse, justifies its continuance.

Though I cannot furnish the historical proof, I believe this power has existed and has been exercised in some form from the very earliest times. It puts into effect the principles on which punishment should be administered, as laid down by the Laws of King Cnut:

"Though any one sin, and deeply foredo himself, let the correction be regulated so that it be becoming before God and tolerable before the world."

Respectfully submitted,

EDWIN J. MARSHALL,
Counsel for Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1915.

No. 11 Original.

EX PARTE THE UNITED STATES, *Petitioner.*

MEMORANDUM OF RESPONDENT, *(In Pro. Per.)*

JOHN M. KILLITS,
District Judge, Northern District of Ohio,
Respondent.

NOVEMBER 30, 1915.

AUTHORITIES.

Page

Act of February 13, 1913 6-17
Ady, State vs., 43 N. J. L., 113 22
Allen, People vs., 155 Ill., 61 14-16
American Law Review (Sept., Oct., 1915).....7-14

Barrett, People vs., 202 Ill., 287 14-15
Buchanan, In Re, 146 N. Y., 264 16
Bugg, Ex Parte, 145 S. W., 831 8

Clendening, Ex Parte, 97 Pacific, 650 12

Dowdican's Bail, Commonwealth vs., 115 Mass., 133...13

Forsyth, People ex rel., vs., Court, 141 N. Y., 288....13

House of Representatives Bill No. 15578.....6
Hilton, State vs., 151 N. C., 687 22

Markuson, Re., 5 N. D., 180 12
Morgan vs. Adams, 8 C. C. A.....11-22

Ohio General Code, Secs. 13709-13715.....14-16

Pointer vs. U. S., 151 U. S., 396 21

Radcliffe vs. State, 26 Ohio Dec., 87 15
Revised Statutes U. S., Sec. 5209 9

Snodgrass vs. State, 150 S. W., 162.....16
Spencer vs. State, 140 S. W., 597 15

Webb, Re, 89 Wisconsin, 354 8-12
Weber vs. State, 58 Ohio State; 56 Ohio State, 616....14
Wells, Ex Parte, 18 Howard, 307 16
Whiting, State vs., 83 O. S., 447 13-15-16
Wilson, United States vs., 46 Fed., 748 11-12
Words and Phrases, pp. 6115, 6116.....16

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1915.

No. 12. Original.

EX PARTE THE UNITED STATES, *Petitioner.*

MEMORANDUM OF RESPONDENT, *(In Pro. Per.)*

Believing that an exposition of respondent's view of the question in this proceeding, beyond the statements of the formal return, might not be unwelcome to the court as a supplement to Mr. Marshall's exhaustive brief, we venture the following, taking the liberty also to bring to the attention of the court developments of the discussion which have appeared since the preparation of the brief.

When the rule herein was ordered, suggestions were invited from every Federal District Judge. All but six or eight answered. Whatever may have been their reluctance to assist the Department of Justice (Reply, p. 9), few hesitated to write fully to respondent. With hardly an exception, including the minority who narrowly construe the powers of their courts and are unable to entertain the discretion now questioned, they were cordial in their sympathy with respondent's course and emphatic in expression of opinion that the lodgment of such power in the trial judge was highly desirable in the interests of society. The return to the rule was

prepared from this correspondence as far as it went at the time and, before final printing proofs were submitted for correction and further suggestion to the judges whose districts were mentioned. This privilege was used in notable instances, and the return may be truly accepted by the court as representing, in great part, the view of other judges.

This interchange with his fellows on the district bench warrants respondent in saying that that district judge who will not learn with gratification that this court affirms the existence of the power under question, and who will not regard such a decision as equipping him with an effective weapon for social good and for the administration of justice, is an exception. This of course is no criterion of the validity of the practice, but it does confirm respondent's feeling that this case is not a mere law-suit, or even an adversary proceeding, but one presenting an issue of general interest, an issue, within its own range of influence, of very great importance to society; one which, if the restraints of proper construction of judicial powers permit, should be settled against the writ prayed for.

If the proceeding were a law-suit only, of no importance beyond the mere question whether a mandamus should issue against the respondent in the specific instance, we might question the form of the remedy selected by the Attorney General, and certainly we would insist that the Department of Justice was proceeding against the wrong respondent. If the discretion undertaken to be exercised in Henehan's case is not enjoyed by the court the order of suspension is a mere nullity and the only proper way to test it, it seems to us, is not to seek to compel the judge to revoke a plainly void order, but to ask for a writ to compel either the issuance or execution of an order of commitment. If the convict is in custody, the issue would arise only in *habeas corpus* proceedings. In this

case it would seem upon the record (page 38) that the only proper respondent is the clerk, who cannot be excused from issuing a mittimus because of an order of the court which the Department holds to be palpably void. However, we hope the court will not deny the writ for want of a proper respondent.

We are moved to this comment because the Attorney General, who declares himself unable, for want of proper appropriation, to allow respondent out of public funds for expenses in defending the rule, except the bare cost of printing, has filed a reply to respondent's return in which, pleading ignorance of the facts from other districts stated specifically in the return, contains this paragraph;

> "As to the several matters averred in the return of which knowledge is denied in this reply, and which are not admitted, strict proof thereof is demanded."

If this demand is insisted upon, we are required to use private means in the incurring of large expense to present to the court facts which are peculiarly in the knowledge of the Government, through the Department of Justice, because they are contained in the records of courts which are in the custody of that Department. In such case respondent must either abandon a feature of the defense which is of the greatest importance, because proof of a somewhat general and long continued practice, like that questioned, is manifestly of great pertinence and force, or we must ask the court to indulge us with time to bring to its attention, and it to receive as satisfactory evidence, the informal statements of judges and clerks. To make strict proof involves an expense which neither this respondent, nor the particular convict whose fortunes are directly at stake, can incur. The very great labor and careful attention manifestly involved in the preparation of Mr. Marshall's brief herein has been without arrangement for or expectation of compensation.

If proof is required that the practice of relieving a convict whose circumstances are exceptional, either by deferring imposition, or by suspension of execution of sentence, is of long standing and of frequent indulgence in United States Courts, respondent will be able to show a much more general observance than indicated in the return, for later correspondence with the judges justifies the inclusion of the Districts of Indiana, Eastern, Western and Northern New York, Eastern and Western Pennsylvania, Montana, Eastern Washington, Eastern Oklahoma, Western Oklahoma, Oregon and South Carolina. The data before respondent indicates a long continued resort to this practice in almost every district, when it seemed that circumstances peculiar to the particular case demanded extraordinary action. In most cases this was done by suspending operation of sentence, almost as frequently by deferring its imposition. Some courts follow the latter practice alone, others use either according to circumstances. Even judges who hold to the Government's extreme view that punishment in execution must inevitably follow conviction, and who reject the doctrine that their courts have any inherent power in the matter, as shown by the correspondence referred to, confess to the use of expedients to accomplish the same end, such as entering an order to withhold mittimus until the district attorney moves therefor, or taking sentence "under advisement" to some later date, even to another term, and then forgetting the case unless moved to a consideration by the district attorney. Of all the district judges who have written us on the subject, but one objects to the providence of such power in his court and the ground of his objection is that it would inconvenience the court unduly!

The Attorney General summarizes the fluctuations of the practice in the Federal courts, as found on page 11 of his reply to respondent's return, thus:

"1. The practice of suspending sentences was never general throughout the United States at any one time.

2. That always in some one or more districts of a single state embracing more than one district, the practice would be indulged in one of the districts and rejected in another.

3. That there was always one or more districts in which at one period the practice would be indulged in and at another period it would not.

4. It was exercised by some judges on the plea of *ex necessitate*, but in recognition of their lack of power; and by some only because they felt it was tolerated by the Government and without any claim of right."

This outline of the situation falls short of establishing a loss, by non-use, of the powers which inhered in "courts" in 1787. Statements 1 and 4, if true, cover no more than mere exceptions to a very general condition and hence are insignificant. Numbers 2 and 3 are not accurate when applied to Ohio at least, for our information is clear that the practice obtained continuously, under all judges in both districts of Ohio, for more than forty years immediately prior to the Attorney General's instructions against it directed to the district attorneys, January 30, 1915.

We submit that the facts are indisputable, not affected by the summary quoted above, that the practice has had so long continued, and so very general an application in Federal courts as to have amounted to a custom, the interruptions or infrequencies of resort to it being very largely accountable to variations in the amount and character of criminal work in the several districts, or to the dispositions of individual judges. We can see how a judge who values his own convenience excessively, or one recently come to the bench without much previous experience with the criminal branch, or one disposed to close and literal analysis of the written law as the source of his judicial power might not favor it. The districts, too, necessarily vary in the kinds of crimes most frequently

committed in them. Toledo, which is the seat of one of respondent's courts, is one of the greatest railroad centers in the United States, at least as a transfer point. Hence it is that violations are extraordinarily numerous of the law of February 13, 1913, giving Federal courts jurisdiction of depredations upon freight in interstate transit. Very many of the more than eighty persons who have been before respondent's court under this act are in or just emerging from adolescence and with no criminal records. Districts will occur to the court wherein Federal crimes of this character are very rare.

The Government's reply to respondent's return informs the court that for more than twenty-five years the attention of Congress has been directed to this practice. The failure of Congress to act, we respectfully suggest, either to approve or reprehend it by legislation, is, at least, as much evidence of legislative approval as of disapproval. Moreover, H. R., 15578, in the last Congress, when introduced by the consent of the Department of Justice, contained in Section 269, as the Government admits (Reply, page 10), "a provision prohibiting the exercise of this power." It is true that, eliminating the declaration against the power, the House of Representatives did not adopt a suggestion to provide definitely for its exercise, yet, as the bill passed the House and went to the Senate, Section 269 was so modified, beyond a mere elimination of the declaration against the power, as, through the insertion of the words "unless suspended" when dealing with the execution of criminal judgments, to bear a construction that the practice was not obnoxious to the legislature. The bill was not reported out of the Senate Committee.

Aside from its failure to deny the averments of respondent's return quoted below, the reply thereto inferentially admits their truth, and it is in this record, as averred by respondent (pages 4 and 8), that,

"In Respondent's own district, at least since July 1, 1910, and until about January 30, 1915, when the Attorney General of the United States issued instructions to all District Attorneys to object to the practice, all suspensions of sentences were with the consent of the District Attorney, and in a majority of cases, they were upon his recommendation.

"* * * That the exercise of the power now in question has been acquiesced in by the Department of Justice and the Presidents for nearly a century, and the records of the courts show instances in which the Department of Justice requested the courts to exercise the power."

The paragraph last quoted describes the whole current of representation in our correspondence; none of the judges but say that they indulged the practice with the consent, and often on the recommendation, of the District Attorney, and sometimes on direct request from the Department.

We do not believe that the consent of the Department is essential to the exercise of this power; we refer to this history only to show that we have a court practice observed for many years, and very generally over the country, for the existence and continuance of which the legislative and executive branches bear considerable responsibility.

Since the preparation of the main brief, our attention has been called to an article by Professor Barnett, of the University of Oregon, on "Executive, Legislative and Judiciary in Pardon," published in the September-October, 1915, number of the American Law Review, the court's consideration of which is invited, although the conclusions of the author, as to the precise point in this case, are adverse to respondent's position. The dominating features of this article are, the great diversity of judicial opinion exhibited, the amazing variety of argument indulged in, and the undoubted and steady tendency of trial courts, almost *ex necessitate*, as the agencies having the earliest and clearest understanding of the

force of those circumstances which are peculiar to the particular convict and his crime in its extent, occasion and manner of accomplishment, and in his relation to his community, to vary the force of the incidence of punishment as prescribed by the law. The impulse to act is so strong, and is so consonant with the spirit of an age which has enlarged its view of the function of a criminal prosecution, that the constant effort, conscious or otherwise, of the judge, is to avoid in special cases that unvarying and rigorous application of the law for which the Gevornment here contends. So various subterfuges are resorted to, such as the postponing of a motion for new trial, or delaying the hearing of a motion in arrest of judgment, or indulging a liberality of determination of the value of recognizances; these in addition to the expedients which our correspondence shows have occurred to Federal judges.

The books show that even courts of last resort are at pains, sometimes, to find extraordinary ways to avoid the consequences of their own reasoning, when, respecting the particular convict involved in the case before them, that leads them to a situation which affects as wrong their senses of natural as distinguished from legal justice. We note *Ex Parte Bugg*, 145 S. W., 831 (Missouri), and *Re Webb*, 89 Wisconsin, 354. In the first named case the court held that the trial court had no power to suspend execution of sentence because so to do was to "usurp" the pardoning power, and that a void order of suspension, followed by the convict's freedom, did not destroy jurisdiction to hale him into court to be committed after the term, wherefore, strictly Bugg's writ in *habeas corpus* should be denied; but, reflecting that punishments are inflicted solely for the protection of society and that "the criminal laws are not based upon any idea of retaliation against the offender", the court proceeded to determine that in Bugg's case society could "no longer have any interest" in the enforcement of his penalty. Therefore, having consider-

ation for the convict's interest only, it allowed the writ and freed him. It does not appear that the constitution of Missouri divided the pardoning power between the Governor and the Supreme Court. In the latter case, holding that the court's order of suspension was void, the convict escapes on the theory that, the time having expired within which he should have completed his term which, the court says, began to run *eo instanti* the sentence was pronounced, the court had no power to order his commitment; in other words, that he had served his sentence in legal effect, although at all times at liberty on his own application.

We respectfully submit that the dignity of the law requires the issue to be squarely met; that the ends, which all trial judges see should be attempted, may be worked toward under methods recognized to be within the court's powers rather than by subterfuge and thinly veiled evasions of what the Government in this case holds to be an inexorable and inescapable duty.

It ought not to be that a court should be put in a position like that occupied by respondent's court in Henehan's case, wherein it is required to impose a sentence, as a minimum, very far beyond that which, independent of statute, the circumstances peculiarly in hand called for, conceding that an imprisonment sentence to be immediately executed was alone in the court's power to impose. Giving all the force respondent is able to grant to the elements of breach of trust, the relation of a bank to the public, the interests of the Government and the public in securing faithful service in a national bank by a penalty operating *in terrorem*, the fact that the convict entered upon and continued in his employment under the penalty of Section 5209; those criteria determining extent of punishment in addition to the amount of the peculation, and which indicate a severer penalty than in a case of larceny from a private indivdual, still it impressed respondent, then, and the feeling abides, that, considering all the surroundings of his

case, to send Henehan to confinement for five years would be shocking, a miscarriage of justice instead of its due administration. We are under obligation to the Attorney General, in his reference to un-named district judges in Pennsylvania (page 6, Reply) for assurance that this feeling was not an individual idiosyncrasy but had impressed other courts under similar circumstances. We hold this impression with recognition that the court has a duty to adhere to statutory penalties.

Recurring again to the Government's reply to the return, we suggest that it is no argument that the power does not inhere in the court to show that it has been abused by Federal judges. We might as pertinently cite the court to the many instances known to the respondent in his own judicial experience, and to those reported by judges in many other districts, in which, by the action in dispute, society has indubitably regained from criminal ranks valuable factors in men who have found the court's trust, coupled with its power of punishing a trust betrayed, just the moral stiffening necessary and efficient to turn them to and to maintain them in upright lives. To call the roll of the score or more of convicts in respondent's court, under respondent and his predecessor, Judge Tayler, and his late colleague, Judge Day, most of them young men, who, in their lives and attention to their social responsibilities, are each justifying the court's trust, would impressively sustain the social principle of the practice, and the impression would not be lost in comparison with the court's experience with the five or six who have betrayed the court's confidence and have been required to suffer sentences.

The return (page 2) makes it plain that a discretion is to be used only with definite relation to the benefit of society through a disposition of the individual calculated to restore him to normal social efficiency. There is no claim that in its exercise either caprice or arbitrary decision has any place.

So far as Federal practice may be settled by an inferior court, the law applicable here is not that stated in *United States vs. Wilson,* 46 Fed., 748, but is that of the recent case (8th Circuit Court of Appeals) of *Morgan vs. Adams,* Judge Sanborn's decision, concurred in by Judges Carland and Trieber, overruling the Wilson case and assimilating the Federal practice as to the sole point decided by the court, with the State authorities upon which this respondent relies. The case is of interest because Adams was the beneficiary of a suspension of execution granted by Judge Day of respondent's court in the Eastern Division. During the second term thereafter the convict violated the conditions of his liberty and was taken to Leavenworth. On habeas corpus the court of the District of Kansas followed the Wilson case and many of the authorities relied on by the Government in its reply to the return, and held that,

> "Because the court ordered the sentence suspended during good behavior of the accused at the same time that it rendered the judgment imposing sentence, the latter was unauthorized by law, the commitment under which was illegal and did not justify the imprisonment of the convict."

The decision of the Court of Appeals is not yet published. From a copy furnished by the clerk it is noted that court recognized the question here to be one "upon which there is a conflict among the authorities," and decided the case "without the expression or intimation" of its views thereon, but, acting upon the concession of both parties to the action that the trial court was without the power, and adopting for the case before it the conceded theory that the order was wholly void, it held that the "sentence stands and is enforcible by the court at any time after its rendition, either before or after the term of the court, until the convict has suffered the penalties it imposes." In Adams' case the order of suspension was embodied in the judgment imposing

sentence. The court holds that if the former were void, it was separable from the latter, whose force remained unimpaired.

If Judge Sanborn's conclusion is accepted that jurisdiction is not lost by suspending execution of sentence, much of the argument and the grounds of decision, of many cases upon which the Government relies in its reply to the return lose much of their force for the opinion of the Circuit Court of Appeals is opposed to *Re Markuson,* 5 North Dakota, 180; *Ex Parte Clendening,* 97 Pacific, 650; *Re Webb, supra,* and other cases holding jurisdiction to be lost by lapse of time.

In Henehan's case as distinguished from that of Adams, the order of suspension was not a part of the judgment of sentence, but was carried into a separate order.

Recurring to *United States vs. Wilson, supra,* which the Government uses as authority for the statement (Reply, pp. 9, 12), that the practice, since 1891, has been "opposed to a decision of a District Court of the United States", we observe that, first, that case involved an infraction of a local (territorial) statute, and, second, the decision was controlled by a provision of the Idaho law which required, except in certain instances provided by statute, that sentence should be imposed at the term at which conviction was had. Wilson was convicted in June, 1888. Imposition of sentence was suspended and was not thereafter attempted for two years.

It is curious to learn, through correspondence with the present judge of the District of Idaho, that Judge Beatty, who decided Wilson's case denying the power generally, was himself accustomed to exercise it when he had a special reason affecting a convict under the federal laws.

We have not hitherto cited the Districts of Idaho and Eastern Wisconsin as contributing to the survival of the power from common law times, but it is to be noted that the predecessors of the present judges, in each district, did indulge

this practice, for which the present judges are not able to see a valid warrant. In Idaho, so the present judge informs us, a demand is found, however, at times to resort to expedients to the same end which, in his judgment, have more color of authority, and which are employed with the consent of the district attorney.

The Government's reply affects to disparage the force of respondent's citation of Federal precedents, notably those from Massachusetts and New York, by alleging that they were influenced by local practices in the State courts. The Attorney General, however, is mistaken in the statement, as to either state, that the practice "is affected by specific legislation" or "is based upon a statute enacted (in New York) in 1893," for the courts in *Commonwealth vs. Dowdican's Bail*, 115 Mass., 133, 136, and in *People ex rel Forsyth vs. Court, etc.*, 141 New York, 288, distinctly hold that the power inheres independent of statute. Of course we are not claiming that a practice, not otherwise justifiable, may be sustained in the Federal courts because followed by the courts in which the Federal district lies. The local practice is only significant of the survival of the common law power. We may say that the inherent power of a State court to suspend the execution of sentence is no longer an open question in Ohio. Mr. Marshall cites *Weber vs. State*, 56 Ohio, 616. Since the preparation of his brief, through a development in a State trial court, there has been brought to our attention a decision without an opinion by the Supreme Court of Ohio, *State vs. Whiting*, 83 Ohio State, 447, decided October 11, 1910. This case was decided after the passage of Sections 13709 to 13715 inclusive, General Code of Ohio, the provisions of which apply to the crime of which the convict Whiting was guilty. We have before us the record and briefs in the Supreme Court of Ohio. But one question was argued, presented and decided. The crime was a felony. The entry of suspension, after stipu-

lating the conditions of the latter, recited: "The court in making the above suspension does not make the same under the authority of an act entitled, 'An Act, etc.' (G. C. Ohio, Secs. 13709, *et seq.*), but does so under claimed inherent authority on the part of the court to suspend sentence." Exceptions were taken directly to the Supreme Court under the Ohio practice by the prosecuting attorney. The authorities pro and con which are familiar in the arguments in this case at bar were discussed in the briefs and the attention of the court was called to the provisions of the court parole law. The Supreme Court, without a dissent, adhered to its decision in *Weber vs. State*, and overruled the exceptions. There can be no question but that this decision, although not accompanied by an opinion, is an affirmance of *Weber vs. State*. The Ohio court thus found itself in harmony with *State vs. Osborne*, 79 New Jersey Equity, 430, 445, and opposed to *People vs. Barrett*, 202 Ill., 287.

In all the discussion of this subject, judicial and lay, it is conceded that common law courts in 1787 had the power both to suspend the imposition of sentences and to suspend execution of sentence imposed. Professor Barnett in his paper referred to (volume 49, American Law Review, pages 709, 713), makes this clear. (See also, *State vs. Osborne*, 79 New Jersey Equity, 430, 441.)

The decisions which hold against the presence of this power, and especially that the second form of its exercise is without warrant, aside from the general objection that it is an invasion of the executive function, group themselves roughly into five classificatons:

1. Those which maintain in substance the doctrine of *People, ex rel., etc., vs. Allen*, 155 Ill., 61, that

> "The state has a right to demand and the welfare of society requires that those who are convicted

and found guilty of violations of law shall be promptly and certainly punished."

2. Those which adopt the view that the reasons for conceding the power to common law courts fail in this age because the rigors of administration of criminal law have been very materially abated in the last century, and the right of review now obtains. Of this, *Spencer vs. State*, 140 Southwestern, 597, may be cited as an example.

3. Those which deny the power because criminal courts have no common law criminal jurisdiction.

4. Those that hold that jurisdiction over the convict is forever lost by the attempt to suspend execution indefinitely at the pleasure of the court, even upon his own application.

5. Those holding that when the statute provides a method by which courts may admit the convict to parole, such statutory powers exclude the operation of any analogous power, even though otherwise concededly inherent. This is the doctrine of *People vs. Barrett*, 202 Ill., 287. Very recently a Common Pleas Court of Ohio (*State vs. Radcliffe*, 26 Ohio Decisions, 87, Law Bulletin, November 15, 1915), admitting knowledge of the fact of the decision (without opinion) in *State vs. Whiting, supra*, refused to suspend execution of sentence solely on the theory of *People vs. Barrett*. Had the court examined the record behind the decision in the Whiting case it would have found itself confronted with the alternatives of overruling its own Supreme Court or of avoiding the authority of the Illinois case.

Considering the general objection, the main brief has called the attention of the court to the exercise of analo-

gous powers in the administration of criminal law which are not conceived to be invasions of the executive jurisdiction. The practice of entering *nollies*, of immunizing accomplice witnesses (*State vs. Osborne*, 79 New Jersey Equity, 430, 444), of imposing two or more sentences of imprisonment to be concurrently served, of remitting fines by executive officers under statutory provisions, of paroling convicts by courts under such statutes as Sections 13709, *et seq.*, Ohio, are each in close analogy to the practice in question. Two of these have no other sanction than public policy and custom. It would seem that if the court cannot parole without a statute because so to do is to invade the province of the executive, the act is not changed in character in this respect because it is done under the sanction of legislation. It seems that the difference between a pardon with the consequent restoration of all rights forfeited by conviction, and a parole under all the burdens of a conviction except actual confinement, is too obvious for even confused thought. In the latter case the convict is far from restoration to the freedom of action which is his under a pardon. The distinction between "a reprieve", as the term is used in constitutional provisions and the suspension of execution of sentence, is noticed by the courts (*In re* Buchanan, 146 New York, 264; Words and Phrases, pp. 6115-6116). One is not the equivalent of the other in the constitutional sense (*Ex Parte Wells*, 18 Howard, 307, 314; *Snodgrass vs. State*, 150 Southwestern, 162).

Considering the classifications above attempted, *seriatim*, we are unable to concede that invariably the welfare of society requires "prompt and certain punishment" of every one convicted of a crime, as the court says in *People ex rel., etc., vs. Allen, supra*. Celerity in the apprehension for and conviction of crime is exceedingly important to society and also to the individual convict who is not yet a hardened criminal, but with all the endeavor that mod-

ern thought has called into activity to adapt penal institutions to the reformation of the convict in helping him to a moral equilibrium, none, of all the many admirable and humanely conducted institutions of this country, has succeeded very far, because their efforts are handicapped by the community system and by the inevitable tendency of a convict, whose moral nature is weak, to lean upon those who are his official overseers. The doctrine quoted from Allen's case is not only abhorrent to the enlightened thought of an age when the psychology of crime is becoming understood, and the function of punishment therefor is obtaining a more exact definition in its relation to society, but one familiar, by experience, with the administration of criminal law can see that, when it is invariably adhered to, the principle in operation works a detriment to society which no effort, in the way of humane and intelligent reformatory methods in confinement fully overcomes. Certainly a punishment to be immediately executed is often the only resource, but many times we think it should be the very last.

A concrete example illustrating the argument interrupted the preparation of this memorandum. Of six young men under 22 years of age jointly indicted in respendent's court on the 18th of November, 1915, for molesting interstate freight (Act of February 13, 1913) two were of the age of eighteen and were without any criminal records and with no habits of idleness and mischief which had attracted the attention of the very vigilant juvenile court of Toledo. They were youths neither bad nor good—morally somewhat indifferent, but not idlers—with no pronounced bad habits and, in neither case, with vicious home surroundings. Under the leadership of a personality who deserved and received a three-year sentence to be immediately executed, they were present at, but not actively engaged in, the breaking into and rob-

bing of a car. The generosity of their leader bestowed upon each a pair of shoes. Under the law they were undoubtedly guilty. To give them a small fine would be manifestly wrong, for so to punish them would have the appearance of bartering their offense; to send them to jail as convicts would be to expose them to vicious surroundings and to confirm incipient tendencies if the term were a substantial one; to give them an unsubstantial sentence would be to belittle the law; but to give them a sentence which, in its character, would mark the crime as serious, with a suspension of its execution while maintaining an industrious and law abiding life, would be to send them forth with the endorsement that they have not forfeited all trust, an obvious help to them in their efforts to retrieve their almost thoughtless culpability and to establish a self-respect. The incentive to earn a freedom under these conditions operates, under our observance, as a strong factor in the development of a character resistent to temptation. At liberty now on their own recognizance and living under an appreciation that they have been apprehended under a serious charge, we look for them to face the court at the time set, some months hence, for whatever disposition of their cases the situation demands and warrants, with moral characters so far developed that society will get far more out of them than if they had each been promptly punished. It is absurd to say that pardon is available after conviction and should be their only chance of lenient treatment. Pardon for them is largely a theory. If they had the means and influence to seek it the grant would in due course come only after deterioration of character had had its opportunity through a sentence in execution. Attention has been called in respondent's return to the fact that a pardon application is not heard until after service of sentence is begun.

As to the second proposition, assuming that the courts of 1787 had the power only for the reasons alleged, still a power whose exercise is adhered to would not be lost simply because the reasons for calling it into being had ceased to exist. Until some definite denial of its continued vitality is established each exercise by a court would be presumed to have been for some cogent and sufficient reason peculiar to the case in hand. We cannot concede that reasons for this practice, as potent as in the times of Hale and Blackstone, do not now exist. Of course we have review, but review is only for those who can command means to take it. Four of the six young men referred to above have been sentenced to terms of imprisonment by respondent and are now under commitment. No one of them could have had a review of his case without financial assistance impossible except from charity. The very great change in the office of punishment, as viewed by the best thought, since Blackstone, affords a reason for the existence of the power more compelling than any of his day. Then punishment was punishment, nothing more. The law was to be vindicated by the suffering of the law breaker. Society benefited only by relieving it temporarily from his attacks, and perhaps through the deterrent force of the example in his sentence. Then the courts sought some way to relieve the convict of the harshness of the law. Now, we relieve him of the mistakes in the law's application, if he has the means for an appeal, but we find a better vindication of the law in reclaiming the individual, if possible, through the power to punish him, and we resort to the old and narrow idea of retributive punishment only when society can be served in no other way. We have abandoned the "traditional theory that a law broken meant that there was a wilful transgressor who deserved to suffer retributively." * We now understand that

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* Introduction to "Modern Theories of Criminality," DeQuiros, in The Modern Criminal Science Series.

it is for society's benefit that crimes are punished, and we consider society's interests first. If that interest may be best served by special treatment of the individual such a course is to be chosen under the logic of the reason which provides punishment for crime. No agency can be better equipped for this service than the trial court, and the tendency which the science of criminology shows to be reasonable is to enlarge rather than to curtail the powers of such courts. The right of appeal secures no benefit to society; it is an individual right.

Again, the power was used by the common law courts because inherent. It was not born of the severity of the criminal law, but, being already in the courts, it was exercised when an amelioration of the law's operation was called for, and therefore an abatement of the law's severity could not affect its inherency. The constitution of a court is not affected by a change in the laws which it administers. An inherent power is not lost because not continuously used for the special reasons which first invoked its exercise. They might fail and others develop which may operate just as surely to preserve its vitality.

There has been no atrophy of the power by disuse. We have shown herein that the executive department, and, in some measure, the legislative, is precluded from so claiming. An active experience of nearly twenty-five years with administration of the criminal law, almost equally divided between the prosecutor's office and the bench, state and federal, profoundly impresses the respondent with the necessity of this power in the court immediately in contact with cases under the law, and that it is indispensable if we are to deal with crime with that enlightened understanding which is developing criminology into a science. It may be that the Department of Justice, whose official personnel enjoys but comparatively brief service in point of time, having, however, a broader geographical jurisdiction, and having the enforcement rather than the administration of the law as a duty, is quali-

fied to speak *ex cathedra* on the subject. However that may be we are unable to see in *Pointer vs. United States,* 151 U. S., 396, 420, "an express declaration of this court that the existence of the power was then undetermined," (Reply, page 12) to operate, as the Government seems to think, as a warning to those courts attempting thereafter to "indulge" it; rather we read that decision as indicating an open mind, only, in the court, at least. The return sets up facts, whose existence is shown through the correspondence with other district judges, which indicate that the experience of respondent is that common to most judges whose service on the bench has been at all extended, for it is precisely the judges of the longest and most comprehensive experience who have been the most earnest in their suggestions to this respondent by way of assistance in this proceeding.

The authorities which deny the power because criminal jurisdiction is purely statutory are confusing power and jurisdiction. The latter may be entirely statutory, but, in the jurisdictional field, the former may exist as at common law. The legislature may limit a court's jurisdiction to crimes purely statutory without affecting the powers inherent in the court from its very constitution. Mr. Marshall (Brief, pp. 57 *et seq.*) has fully discussed the proposition that the Constitution used the word "court," even when applied to a tribunal to be created by legislative action, as designating a public agency having the attributes, as distinguished from jurisdiction, pertaining to the common law organizations, and respondent is not able to enlarge upon his argument. Of course it is that Congress may legislate this particular attribute away from a district court, but, it would seem, such action, to be effective, must be special or direct. In the face of a steady and very extensive practice, an inference merely from legislation which deals primarily with the court's jurisdiction should not be very readily admitted as an effective denial of an active and beneficial power.

Since the decision in *Morgan vs. Adams, supra,* we are not specially concerned with the decisions which adhere to the fourth theory against the possession of the power. There is no reason, at this day, when all effort is directed to the fairest consideration of one charged with crime, why argument should be refined to relieve him from the consequences of his betrayal of a beneficial trust which his own application invoked. We are confident this court will join Judge Sanborn's associates of the Eighth Circuit in approving his very sensible conclusions.

The fifth ground of objection fails in application to the case at bar because Congress has not enacted a general parole law.

Chancellor Garrison, in *State vs. Osborne,* 79 New Jersey Equity, 430, 445, effectually disposes of the argument that the power should not be left with the trial court because a convict under suspension would be exposed to possible embarrassment due to fluctuations in judicial temper, caprice on the bench, or malice of enemies, by pointing out that the convict creates his condition knowingly, that "in peril of suffering the full penalty of the law", if it is not immediately visited with it, many things in the future "may happen favorably to him; while nothing worse than his present plight can possibly happen." The chancellor thinks that if the convict does not complain, no one else need worry about his future. Again, if the courts are conceded the power, then a convict, accepting and abiding by the terms of a suspension, is entitled to consideration. Whether he has a right to the continuance of its operation becomes a matter of somewhat formal judicial determination if he is molested. Caprice or arbitrariness cannot work to his disadvantage for he has a right to invoke judicial discretion.

State vs. Ady, 43 N. J. L., 113;
State vs. Hilton, 151 N. C., 687.

Concluding, it would seem that the powers of a court compelled to deal with criminality at first hand are to be construed in the light of what DeQuiros calls "the new horizons of criminal law," which "to serve with the best of his ability" is the duty of everyone. If courts in the days of Hale and Blackstone were recognized to enjoy such powers as inherent to serve the individual only, why should not the same be conceded to the same sort of courts now, for public service through the individual in the encouragement to him to mount to higher ground as a factor of society?

When juries learn that what DeQuiros terms the "kind of modern dosimetry which offers the same remedy for every crime and for every delinquent, varying only in quantity" has been replaced by a treatment of the particular case in an effort to adapt remedies to the circumstances about and concerning an individual, that society may be benefited as he is helped, then sympathetic verdicts will become rare.

It is our experience that more acquittals result from sympathy than from failure of necessary evidence. A year ago a man under twenty-one, but with the responsibilities of a wife and infant upon him, faced a jury in respondent's court upon a charge of larceny of a parcel-post package at the railway station where he was employed. It was impossible to keep the elements of sympathy out of the case. The anxious wife and helpless infant were in evidence with appealing force in spite of anything the court could legitimately do. We know, from what the jurors subsequently said, that conviction, upon circumstantial evidence alone, resulted most largely from the jury's belief that the court would probably suspend a sentence over the defendant. The psychological effect of an acquittal through sympathy upon a moral character yet weak from undevelopment or otherwise, may have, as

predominant, a direction towards reducing the offender's power of resistance; on the other hand conviction, coupled with the strength gained from the assurance that in spite thereof, confidence in the offender's elementary integrity is not lost, has an effect almost inevitable towards moral rehabilitation. Events since this incident seem to us to fully justify the court's position therein, and here maintained.

While we cannot yet endorse all of the conclusions of the gifted Spaniard from whom we quote,* we do believe that the time is here when "forms that cause human dignity to suffer or submit it to shame and insult" should be the very last resort, to be adopted only when the controling object of punishment, the administering of justice upon the individual for the benefit of society whose conventions he shatters, cannot be otherwise attained.

Conceding the right of the Attorney General to question the action of respondent in the matter before the court and accepting the issue gladly for whatever may be the result in settling a question which now is often the cause of undignified judicial practice, we cannot repress the feeling that his circular of January 30, 1915, asked the federal *nisi prius* judiciary to take a decidedly backward step. It is also a matter of regret that, for reasons already given, respondent has not had the means to command that full presentation of the question which is desired.

Respectfully submitted,

John M. Killits

District Judge, Northern District of Ohio,
Respondent.

NOVEMBER 30, 1915.

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*"Modern Theories of Criminality" (pp. 240, 241).